No. 330

In the Supreme Court of the United States

OCTOBER TERM, 1948

UNITED STATES OF AMERICA, APPELLANT

v.

INTERSTATE COMMERCE COMMISSION, ET AL., APPELLEES

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF COLUMBIA

BRIEF FOR THE INTERSTATE COMMERCE COMMISSION

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OPINIONS BELOW

The opinion of the specially constituted District Court (R. 129) is reported in 78 Fed. Supp. 780. The reports of the Interstate Commerce Commission involved (R. 73, 87, 101) are reported in 263 I. C. C. 303, 264 I. C. C. 683 and 269 I. C. C. 141.

STATUTES INVOLVED

The pertinent provisions of the Urgent Deficiencies Act and Interstate Commerce Act are set forth in the Appendix.

QUESTIONS PRESENTED

1. Whether, in view of its requirement that suits to set aside orders of the Commission shall be brought against the United States, the Urgent Deficiencies Act may be said to contemplate or permit the bringing of such a suit by the United States.

2. Whether the United States, having elected to bring its claim for reparation before the Commission by complaint and having prosecuted such complaint to final determination, was not precluded by section 9 of the Interstate Commerce Act from thereafter resorting to the alternative procedure of a suit in a federal district court, whether regularly or specially constituted.

3. Whether the special procedure provided by the Urgent Deficiencies Act for suits to enjoin or set aside orders of the Commission is applicable to Commission orders in respect of claims for reparation.

4. Whether the Commission's action in denying the claim of the United States for an award of reparation was not supported by ample evidence and findings and in all other respects valid.

STATEMENT

This is a direct appeal from a final decree (R. 134) of a specially constituted district court dismissing, for lack of jurisdiction, a petition of the United States seeking the enjoining and setting aside of an order of the Commission,

whereby the Commission denied a complaint of the United States asking for an award of reparation against certain railroads serving the port of Norfolk, Va. *United States* v. *Aberdeen & Rockfish R. Co. et al.*, 269 I. C. C. 131.

1. Commission Proceedings

By its complaint (R. 144), filed with the Commission April 15, 1944, the United States alleged, in effect, that the railroads' failure to furnish the facilities (wharfage) and perform the services (unloading and loading of cars, para. VI) incident to shipside receipt and delivery of its export, import, coastwise and intercoastal freight at Army Base Piers 1 and 2, Norfolk, or, in lieu thereof, to pay it an allowance for its furnishing of such facilities and performance of services, was an unjust and unreasonable practice and resulted in rates that were unreasonable, unjustly discriminatory and otherwise unlawful. The prayer (para. XIV) asked the Commission to require the railroads "to establish and pay in the future to complainant an allowance in such amount as it shall deem to be just and reasonable compensation for furnishing the facilities and performing the services at Army Base Piers Nos. 1 and 2 * * * or, in the alternative, to establish and apply in the future separate wharfage and terminal charges for the services at Norfolk, Va., and corresponding reductions in the existing line-haul rates applicable on export, import, inter-

coastal, and coastwise traffic to and from Norfolk, Virginia." The prayer also asked for an award of damages on past shipments handled over the piers.

"It is neither the legal duty of the railroads to provide piers, which are essentially steamship facilities, nor to load or unload carload freight except in unusual circumstances, such as livestock, or freight that is to be transshipped by the railroads of their agents. When they obligate themselves to load or unload carload freight, the duty is established by tariff undertaking. In assuming that obligation with respect to export and import traffic, the carriers have restricted the practice to so-called public piers, that is, piers operated by railroads, steamship companies, or public wharfingers, and have excluded the so-called private piers, that is, piers operated by the owners of the freight." (269 I. C. C. 141, 142; R. 102.)

Similarly as at other Atlantic ports, there have long been piers at Norfolk used for water-borne traffic shipped by rail to or from that port, these being public piers of the kinds just described and including private piers, operated by the owners of the freight. And, similarly as at other Atlantic ports, while the railroads reaching Norfolk have, in connection with freight to be transshipped by them or their agents, accorded free[1] wharfage

[1] Free in the sense of there being no charge to the shipper therefor other than included in the export, import, or coastwise rate.

and free handling service (unloading of outbound freight to pier floor and loading of inbound freight from pier floor to car), they have limited the practice to the public piers and have not extended it to private piers operated by owners of the freight or even to public piers so far as freight owned by the pier operator is concerned (R. 91, 323). Originally the practice of according wharfage and handling free, that is, as a service included in the port rates,[2] was confined to railroad piers and although, as indicated, such practice has been extended to include municipal and other public piers operated by public wharfingers, it is still restricted in principle to railroad piers, in that, under contracts, the public pier operator, or wharfinger, acts as the railroads' agent (R. 304–305).

From the practice of according "free" handling, the carriers' tariffs, both at Norfolk and the other ports, except certain types of traffic,

[2] Meaning export, import, etc., rates. In railroad parlance, export and import rates are rail rates between inland points and the ports but apply only to "traffic which is on its way to (or from) some foreign country." Where this is not the case, as for example, where the movements from inland origins are to end at the ports, the rates that apply are called domestic rates. *Export and Domestic Rates*, 8 I. C. C. 214, 218. Ordinarily the export rates to a port are lower than the domestic rates, this being due, however, not to any less cost in moving the export traffic but to the sharp competition for such traffic between the railroads serving the respective ports. *National Lumber Exporters Asso.* v. *K. C. S. Ry. Co.*, 25 I. C. C. 78, 85; Cf. *T. & P. Ry.* v. *U. S.*, 289 U. S. 627.

namely, short-haul traffic where the rate is less than 10 cents, bulky and heavy commodities (exceeding 3 tons), liquid freight in tank cars and freight moving in open top cars, the latter being handled by ship's tackle (R. 107, 304–305). The statements hereinafter made as to the carriers' practice of performing handling service, or of absorbing the charges therefor, will be understood to be subject to those exceptions.

Two of the piers in the Norfolk port area, Army Base piers Nos. 1 and 2, were completed by the Army shortly after World War I and leased to private interests for commercial peacetime operations as public terminal facilities of the railroads. For several years prior to June 15, 1942, they were operated by the Transport Trading and Terminal Corporation as a public wharfinger and as agent of the defendants. By contract that corporation agreed to unload out-bound traffic from the cars to the pier floor and to load in-bound traffic from the pier floor to the cars whenever the defendants were obligated to perform that service. The defendants agreed to pay the terminal corporation a wharfage charge of 1 cent per 100 pounds and a handling charge of 3 cents per 100 pounds. The contract imposed duties upon that corporation with respect to that service; protected the defendants in the matter of collection of freight charges, improper delivery, and loss and damage claims and gave the defendants the right to police and verify the operations. The

latter also was required to give bond to protect the defendants against its failure to perform its duties (264 I. C. C. 683, 684, R. 88).

These arrangements (prior to June 15, 1942) of the railroads with the Transport Terminal Corporation [3] in respect of wharfage and handling were for the most part the same as the arrangements they had with other public pier operators at the port of Norfolk (R. 281). The names of such public pier operators, including the Transport Terminal corporation, were set forth in the tariff of the Norfolk and Portsmouth Belt Line Railroad [4] (called the Belt Line), the latter being owned by, and performing terminal services for,

[3] Transport Trading & Terminal Corporation, formerly operator of Army Base piers 1 and 2, will be referred to as Transport Terminal Corporation, this for purpose of brevity while at the same time keeping its identity distinct from the other terminal corporations mentioned in the record, particularly Norfolk Tidewater Terminal Corp., and the Lincoln Tidewater Terminal, Inc., the latter operating United Nations Depot 9 for the Government. (Ex. 28, pp. 1 and 2, R. 507–508.)

[4] One of the public pier operators, the Imperial Tobacco Co., handles its own traffic as well as that of the public, but, for its own traffic, it is not paid by the railroads either wharfage or handling charge (R. 329, 358; Ex. 28, R. 510). And this is the rule as to traffic owned by a public pier operator at the other ports as well as at Norfolk (R. 93, 323, 347). Other than the Imperial Tobacco Co., no public pier operator at Norfolk handles its own traffic (R. 351). Exhibit 28, p. 4, gives a list of the private industries, having deepwater piers with rail connections at Norfolk. These industries are not public pier operators, are not the agents of the carriers and are not paid allowances (R. 323).

the eight line-haul railroads reaching the port (R. 75, 88), four of which were official territory lines[5] and the other four, southern territory lines.[6] As applying between the piers of such public pier operators and important origins, the export, import and coastwise rates of the four official territory lines, except the Chesapeake & Ohio,[7] generally included or their tariffs provided for absorption of the charges for wharfage and handling[8] (R. 91). As to the southern lines, their

[5] The Pennsylvania, the Chesapeake & Ohio, the Norfolk & Western and the Virginian.

[6] The Atlantic Coast Line, the South Railway, the Seaboard Air Line and the Norfolk Southern.

[7] Generally stated, the C. & O's reasons for not absorbing wharfage and handling charges of the public pier operators were, apparently, that it had and operated its own piers and terminals at Newport News, which were adequate for its traffic and were not served by the other carriers. Cf. *Norfolk Port Comm.* v. *C. & O. Ry.*, 159 I. C. C. 169, 170. Sometime in 1942 these piers and terminals of the C. & O. were taken over by the Army and were operated by it under a contract, whereby the C. & O. paid the Government an allowance of 50 cents a ton for handling (R. 91, 172). With the Army's special consent, the C. & O. could bring in commercial freight, but, apparently, the consent was sparingly given (R. 182).

[8] The Belt Line (performing terminal switching for the line-haul railroads reaching Norfolk) published in its tariff charges for wharfage and handling the same in amounts as were charged by Transport Terminal Corporation and the other public pier operators at Norfolk, that is, 1 cent for wharfage and 3 cents for handling service. Generally, the owning lines provided for the absorption of such charges of

rates generally included "wharfage and handling only where the Baltimore, Md., rate basis applies and where competition requires it; for instance, from points in Central Freight Association territory" (R. 91, 348). As to origins in the South, there are few instances of rates to Norfolk which include wharfage and handling charges (R. 342, 348, 329–331).

Export and import traffic being highly competitive, the rail rates thereon to and from the ports participating in the traffic are usually made giving special consideration to the factor of competition. In the rate adjustment here particularly involved, Baltimore is the base port. Its port rates are generally the same as its domestic rates and thus take account of distance and related matters usually given effect in the level of rates. On the other hand, at Norfolk, although the distances to that port from important shipping origins are generally much greater than to Baltimore, the export and import rates accorded it are maintained by the carriers at the Baltimore level (R. 105–107), and are, in practically all instances, lower than the domestic rates to Norfolk (R. 92). And, since such domestic rates do

Transport Terminal Corporation and the other public pier operators by referring to the provision in the Belt Line's tariff with respect thereto (R. 91, 203). In railroad parlance, absorption of charges means the assuming and paying by the railroad of charges which the shipper would otherwise have to pay in addition to the rates—here the export, import, etc., rates.

not include wharfage or handling, the inclusion thereof in the Norfolk port rates, or the absorption of the charges, put the latter rates on a still lower level than the domestic basis.

Due to war conditions, the Government, on June 15, 1942, cancelled the lease to Transport Terminal Corporation and took over the management and operation of the Army Base piers for the movement of military traffic "almost exclusively export" (R. 88, 102, 173). The railroads were advised that the said terminals would be "operated and controlled by the War Department"; that it was intended to use them "for Government traffic only"; that circumstances, however, might "require the handling of commercial freight" and in either instance the War Department or its agency will perform all services" (Ex. 1, R. 369). As a result of the Government taking over the terminal and piers and their management and control, the traffic, when delivered in yards, or on tracks, designated by the Army, passed from the custody of the railroads into the possession of the Army, or Government, the owner of the traffic. In such circumstances, the traffic was not export in the usual sense and, except for a special tariff provision would not have been entitled even to the export basis of rates (R. 91, 103, 194, 288, 455). However, at

[9] The evidence shows that use of the piers for commercial freight was in fact closely restricted and very limited. (R. 179.)

the request of the Army and Navy,[10] the railroads had previously put in their tariffs a provision, emphasized both in the testimony of the Army and that of the railroads (R. 194–195, 288, 455), which provided substantially that the export rates will also apply on shipments consigned on bills of lading for export, destined to foreign countries and handled through Navy Yards, Navy Bases and Army Bases (R. 571, 578, 579, 634, 635, 547, 551). After the Army took back its Base piers at Norfolk this provision was applied by the railroads in according the low export basis of rates (R. 91, 93, 103, 105, 579, 634), but, as in effect stated by the Commission, the granting of one concession did not necessarily require the granting of the further concession of paying the Army the allowances demanded (R. 103, 93).[11]

As above said, the Army, when taking over the Base piers, definitely advised the railroads that they were to be operated and controlled by the

[10] See Interveners' Answer, Fourth Defense, para. 1 (R. 125) respecting correction in copy of Commission's report, shown as Appendix IV to the Complaint.

[11] The railroads refused to grant such allowances at any Naval or Army piers where the control or operation of piers or other facilities is taken over by the Government for its own use or they are operated under contract with the Government and under Government supervision (Ex. 1, R. 382). As to the Naval Base at Norfolk where the Navy was handling Navy traffic in the same way that Army traffic was handled through the Army Base: "No allowance has been sought and none is made." (Ex. 28, R. 510–511, 551, 625.)

War Department and that all services would be performed by the War Department or its agency. Moreover, while shortly thereafter, June 22, 1942, the Army wrote the railroads to amend their tariffs to provide for the absorption of wharfage and handling charges on Government traffic (Ex. 1, R. 365), that is, for "an allowance to the United States Government of one (1) cent per 100 pounds for wharfage and three (3) cents per 100 pounds for handling" (Ex. 1, R. 370), it was not until a year later, May 1, 1943, that the demand was changed to one for performance by the railroads of the service, such change being explained by the statement that it appeared that a request that the various carriers perform the services was a prerequisite to an action before the Commission. (R. 580, Ex. 1, R. 375.) Speaking of this, the Commission's report on reconsideration says:

> At first, the complainant sought an allowance for this wharfage and handling, * * *. Subsequently, the complainant indicated a willingness to have the defendants do the work and to let them have its civilian force, subject to observance of rules as to security, safety, fire, cleanliness, et cetera. The defendants could not have performed the service individually but would have been obliged to pool their activities and operate as a unit under the complainant's control. * * * In the instant proceeding, the complainant recog-

> nized that the civilian force was inadequate and that the defendants could not get the additional manpower needed to handle peak loads. Troops would have had to be used, and obviously anything but operation by the complainant was impractical * * *.

The above are findings of the Commission in the matters with which they are concerned, and certainly have, not only substantial, but full, support in the evidence.

As above stated, Transport Terminal Corporation, former lessee of the Army Base Piers, operated them as a public wharfinger and as agent of the railroads under contracts whereby they agreed to, and did, pay the charges of said corporation for wharfage and handling. This relieved shippers of the need of paying such charges, but, in principle, the situation was the same as if the railroads themselves supplied the facility and themselves performed the handling (R. 304–305). In contrast, the Army, after taking over the piers, did not act as agent of the railroads; nor has it ever claimed that it did. What it asked of the railroads was that they amend their tariffs so as to provide for an allowance [12] (wharfage and handling) to the Gov-

[12] Dealing with allowances, the Act (Sec. 15 (13)) provides substantially that, if the owner of property transported under the Act renders any service connected with such transportation, or furnishes any instrumentality used therein, the charge and allowance therefor shall be published in the tariffs and shall be no more than just and reasonable,

ernment. Accordingly, when, after the lapse of a year, the Army changed its request to one asking the railroads to perform the service, coupled with the statement that that appeared to be a prerequisite to an action before the Commission, what the Army apparently then recognized was that the railroads could only be obligated to pay it an allowance for service being performed by it, if they, the railroads, were first requested, and afforded opportunity, to themselves perform such service.[13] But, in any event, as stated by the Commission, in the circumstances shown "obviously anything but operation by the complainant was impractical."

Moreover, with the taking over of the operation of the Base piers by the Army for military traffic and under its close control and management, the character of the facility and service involved underwent a complete change. Briefly outlined, the reports and evidence show that the Belt Line (performing terminal switching

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and the Commission may, after hearing, determine what is a reasonable charge as the maximum to be paid by the carriers for the service so rendered or for the use of the instrumentality so furnished.

[13] This is shown by the complaint filed with the Commission; for what was there complained of as unlawful (para. IX) was the railroad's failure to furnish the facilities and perform the handling service at the Army base piers, "or in lieu thereof to grant complainant an allowance for wharfage and handling." Whatever transportation service or facility the carrier is required to supply, it has the right to furnish. *Atchison, T. & S. F. Ry. v. U. S.*, 232 U. S. 199.

for the owning railroads) delivered cars of outbound freight at the "storage yard" and to some extent at the "north gate"; that it did this pursuant to prior instructions from the Army and on tracks designated by the Army; that, thereupon, the Army took possession of the shipments and controlled the movement beyond to the pier connection, operating several locomotives (with crews) of its own and one locomotive (with two crews) contributed by the Belt, but "all at the direction of the complainants' yardmasters" (R. 275–279); that the freight had to be handled according to priorities and various changing conditions confronting the Army, some cars having to be unloaded immediately whereas others were held a short time or the freight unloaded and stored on the piers or in warehouses; that frequently the Army had to load vessels day and night to meet a convoy deadline hour based on oversea calls; that all activities on the piers had to be supervised and coordinated by a governing head; that, as labor shortages developed, the Army assigned Italian service units to this work and sometimes stevedores to supplement civilian labor; and that, at the time of the hearing, the civilian personnel was only about one-half of the total number employed (R. 89–90).

In short, just as the Army advised the railroads to begin with, so it proved to be the case, that is, that the operation of the Army Base piers had to be and was conducted under absolute con-

trol and closely coordinated direction and supervision of the Army. Work done under such conditions is no part of carrier transportation; it is the shipper's own work. As stated by the Commission (R. 93–94):

> * * * The wharfage and handling at defendant's public commercial piers are transportation provided by them for the shippers. Providing a wharf and handling the freight at the complainant's piers are not transportation but merely facilities provided and work done by a shipper for himself on his own property at his own convenience and expense before or after the transportation is performed. The defendants may not be required, therefore, to provide a wharf or handle the freight on the complainant's piers, and not being required to do so they are not compelled to pay an allowance in lieu thereof. *Propriety of Operating Practices—Terminal Services*, 209 I. C. C. 11.

See also *General Electric case*, 14 I. C. C. 237, 242; *New York Central & H. R. R. Co.* v. *General Electric Co.*; 114 N. E. 115, 117 (opinion by J. Cardozo); *Chicago & A. Ry. Co.* v. *United States*, (C. C. of Apps., 7th Circ.) 156 Fed. 558, 561–562.

Appellant emphasized before the Commission that what it was asking was "that it be treated 'exactly as commercial interests' and that it should 'have the same rights and privileges that a private interest has'." In this connection, it contended

particularly that the railroads' said failure in respect of wharfage and handling incident to its traffic was unjustly discriminatory in violation of section 2 of the Act. Answering this, the Commission said (R. 92–93):

> * * * Section 2 of the act is to the effect that a carrier shall be deemed guilty of unjust discrimination if it receives from any person a greater or less compensation for any service rendered than it receives from any other person for doing him a like and contemporaneous service in the transportation of a like kind of traffic under substantially similar circumstances and conditions. The defendants do not pay allowances to private shippers for wharfage or for handling export freight and do not perform the services on private piers. The freight of other shippers which receives the unloading service is not "like traffic," and if handled in the same manner as the complainant's freight the export rates would not be accorded it, much less the accessorial services. If anything, the complainant is being favored, but, of course, this is not unlawful under the circumstances. * * *.

The Commission's reports deal with certain other contentions made by appellant which will, however, be left for mention in the argument on the merits.

Copies of the Commission's three reports, appearing as appendices to the petition, are con-

tained in the record. The report of the Commission, Division 2, August 3, 1945, found that the railroads' failure to make the United States an allowance for wharfage and handling at Army Base Piers 1 and 2, Norfolk, or to themselves furnish the wharfage and handling, was an unreasonable practice and unjustly discriminatory in violation of sections 1 and 2 of the Act. The railroads were ordered to desist from such violations and reparation was awarded. (R. 73). Following reopening and reargument before the entire Commission, the Commission issued, May 3, 1946, its report and order on reconsideration, reversing Division 2, denying the award and dismissing the complaint (R. 87–98). Subsequently, following a second reopening and reargument, the Commission issued, July 25, 1947, a further report sustaining its findings and action last mentioned (R. 101). Near the close of the last report the Commission said (R. 108):

> During the argument we were advised by counsel for complainant that efforts are being made to have these two piers operated in a manner similar to that in effect prior to June 15, 1942. So that the purpose of this proceeding now is for reparation only.

2. Proceedings in the District Court

The petition of the United States, seeking the enjoining and setting aside of the Commission's order denying an award of reparation or dam-

ages, was filed November 20, 1947 (R. 66). The petition named the Commission as well as the United States as a defendant. December 20, 1947, the Commission filed an answer (R. 115), alleging as a first defense that the District Court was without jurisdiction to entertain the suit for the reasons (a) that a Commission order denying an award of damages is not reviewable in a specially constituted district court, and (b) that petitioner, having elected to bring and prosecute its claim for damages before the Commission, was precluded by section 9 of the Interstate Commerce Act from thereafter resorting to the alternative remedy of a suit in a district court, whether regularly or specially constituted. As a second defense, the answer alleged that the Commission's action denying the award was in all respects lawful and valid. January 13, 1948, the United States filed its answer (R. 118), alleging substantially that the Commission was a defendant in the suit, that it was authorized by law to defend its order without regard to the position taken by the United States as statutory defendant; and that, in the circumstances, the United States, as statutory defendant, neither admitted nor denied the allegations in the petition. March 2, 1948, certain of the railroad respondents in the Commission proceeding who had intervened as defendants in the court suit (R. 119–122), filed an answer (R. 123–128) setting up the same, or substantially the same, defenses as made in the

Commission's answer plus the following: (a) that the court was without jurisdiction because there was no case or controversy in view of the fact that the United States was both plaintiff and indispensable party defendant, and that relief could be granted only against the United States or its instrumentality, the Commission; and (b) that the court was without jurisdiction because the United States had no statutory standing to institute the suit.

June 28, 1948, the District Court rendered its decision (R. 129), holding substantially that, since the statute required that suits to set aside Commission orders be brought against the United States, and did not authorize the adding of the Commission as codefendant, it was confronted with an anomaly—a suit by the United States against the United States; that the United States was not a mere nominal defendant; that the principle that no person may sue himself was applicable to the United States; that such principle was but an application of the general doctrine that federal courts may deal only with actual cases or controversies; that, as to the suggestion of the United States that unless it might maintain the suit, it was without a remedy, such contention was hardly well founded since the statute (sec. 9, Interstate Commerce Act) gave it the alternative remedy of an election to bring suit against the common carriers directly in a federal district court; and that, under any circumstances,

it (the court) must enforce the will of Congress which clearly did not contemplate or intend to permit a suit by the United States against the United States to review an order of the Commission.

July 26, 1948, the District Court entered its final decree dismissing the petition. (R. 134.)

SUMMARY OF ARGUMENT

Jurisdictional

I

The District Court did not err in dismissing for lack of jurisdiction the suit brought by the United States to enjoin and set aside the Commission's order denying its claim for an award of reparation. Because of the statute's requirement that suits to set aside Commission orders shall be brought against the United States, the suit confronted the court with an anomaly—a suit as to which the United States was both plaintiff and defendant and which, therefore, was one presenting no actual case or controversy. And, while, in bringing the suit, the United States followed a procedure whereby, after adding the Commission as co-defendant, it filed on its own behalf a neutral answer, neither admitting nor denying the allegations of its bill, such procedure, which had the effect, among other things, of substituting the Commission for itself as *the* defendant of the suit brought, was neither con-

templated nor permitted by the statute, this being shown both by the provisions thereof and its legislative history.

The provision that suits to enjoin and set aside orders of the Commission shall be brought against the United States first appeared in the bill to create the Commerce Court, enacted into law in 1910. During the course of the passage of the bill, the provision was objected to by members of both houses who, being apprehensive that the Attorney General might not always vigorously defend the Commission's orders, favored the amending of the bill so as to provide that the suits be brought against the Commission and be defended by its own counsel. Attempts to amend the bill to so provide were made but were defeated, the only success attending the attempts being the securing of provisions authorizing, as matter of right, the Commission and any party in interest to a Commission proceeding to intervene in any such suit and to "prosecute, defend, or continue said suit * * * unaffected by any action or nonaction by the Attorney General."

Accordingly, since in face of strong opposition and attempted amendments which would have required that the suits be brought against the Commission, Congress deliberately enacted the provision requiring that the suits be brought against the United States, it is evident that the United States' said procedure in bringing the suit whereby it, in effect, substituted the Commission

for itself as the defendant of the suit brought, squarely conflicted with the statute as so deliberately enacted. Moreover, since Congress, dealing specifically with the Commission's status in the suits, deliberately and advisedly fixed such status as that, not of a defendant or co-defendant, but simply an intervener, it is further evident that even the first step in the United States' said procedure—that of naming the Commission as well as the United States a defendant in the bill it filed—was in conflict with the statute. So that, while, as apparently relied on by appellant (R. 119), it was not until after the Commission made answer to the bill, that the United States filed its neutral answer, it is not apparent that that fact changed the situation in the least. As in effect said by the District Court (R. 131), since the adding of the Commission as co-defendant was without warrant in law, the suit before it was nothing more nor less than a suit by the United States against the United States. Such being the nature of the suit, the Commission's answer to the bill can at best be regarded only as an intervention, but since, before the Commission could by intervention become a party defendant, a valid suit must have first been begun, it is to "place the cart before the horse" to urge that the Commission's intervention supplied the necessary actual defendant to make the suit valid.

Apparently, the thought of appellant United States that it may, as plaintiff, sue to set aside

a Commission order, if but naming the Commission as co-defendant and thereafter filing a neutral answer in its own behalf, rests largely on the fact that the Commission, when intervening as party defendant in a suit to set aside one of its orders, is authorized to continue the defense thereof "unaffected by the action or nonaction of the Attorney General." In this connection, the United States refers to a number of suits to set aside Commission orders which it declined to defend, or to further defend, either by similarly taking a neutral position or by answers or other action confessing error in the orders. But since the suits referred to were brought by plaintiffs other than the United States—for the most part carriers—it is evident that, even though, by its filed answers or other steps, the defendant United States declined to defend the orders, the suits were, when and as brought bona-fide suits against the United States, presenting for decision actual controversies between such plaintiffs and the United States. And that being so, it followed that the Commission and others interested could, by intervention, become party defendants and, once defendants, could continue the defense of the suits "unaffected by (the said) action or nonaction of the Attorney General." On the other hand, since here the suit against the United States to set aside a Commission order was brought by the United States as plaintiff and, since, too, by its very procedure in bringing

the suit—its procedure of adding the Commission as co-defendant and on its own behalf filing a neutral answer declining to defend—the United States seemingly recognized the incongruity of attempting to conduct the defense itself (*Globe & Rutgers Fire Ins. Co.* v. *Hines*, 273 Fed. 774, 777), it is equally evident that there never was instituted an actual suit against the United States as a real defendant—a defendant who it was ever intended should defend.

In fact, it seems plain that the said procedure was particularly designed to in effect eliminate the United States as defendant while supplying the Commission as a defendant in its place and stead; but, to consider that the United States could in this way gain standing to sue as plaintiff would be to assume that it might change the Commission's statutory status of intervenor to that of a defendant and in effect substitute the Commission for the United States as *the* defendant of the suit, whereas, as above pointed out, both such result and the intermediate step of changing the Commission's status of intervenor to that of co-defendant squarely conflict with the statute's provisions as confirmed by its legislative history. They also conflict with decisions of this Court, holding that the United States is an indispensable party defendant in suits to set aside Commission orders. And, while such holding does not mean that the Commission, when intervening in a suit validly brought, could not continue the defense

thereof unaffected by the United States' failure to defend, it does mean at the very least that, in order that a suit be valid at its inception or at any time, it must be a suit brought against the United States as a real, and not a mere nominal, defendant.

Although here the United States, in its capacity of defendant named in its bill, filed a neutral answer, it is difficult to picture it as truly neutral any more so in that capacity than in its capacity of plaintiff. Since the suit was brought by the United States and since, moreover, it was concerned with the recovery of money claimed to be due the United States, it seems clear that the United States' true position, though responding as defendant, would have been better reflected by an answer admitting the allegations of the bill it filed and joining in its prayer for relief. In any event, it is manifest that its position or views were such as to preclude it from filing answer, opposing the bill and asking that it be dismissed. In short, the very procedure and steps the United States found necessary to adopt in bringing the suit to set aside the Commission's order convincingly demonstrate that the suit was outside the scope of the Urgent Deficiencies Act and the District Court's jurisdiction.

II.

The suit of appellant United States seeking the setting aside of the Commission's order deny-

ing an award of damages was also outside and beyond the District Court's jurisdiction for the reason that appellant, having elected to bring its claim for damages before the Commission by complaint and, having proceeded to a final determination before that body, it was, by force of section 9 of the Interstate Commerce Act, precluded from seeking reparation upon the same claim by the alternative procedure of a suit in a federal district court. *Standard Oil Co.* v. *United States*, 283 U. S. 235, 241; *Ashland Coal & Ice Co.* v. *United States*, 61 F. Supp. 708, affirmed *per curiam*, 325 U. S. 840; *George Allison & Co.* v. *United States*, 12 F. Supp. 862, affirmed *per curiam*, 296 U. S. 546.

In the *Standard Oil case, supra*, a three-judge court case seeking the setting aside of a Commission order denying reparation, this Court sustained on three grounds the District Court's decree dismissing the suit for lack of jurisdiction, the third ground being based on section 9 of the Interstate Commerce Act, which provides that a claim for damages against a carrier may be brought before the Commission by complaint or by suit in a federal district court, but that the claimant shall not have the right to pursue both remedies, and must in each case elect which one of the two methods of procedure he will adopt. After stating that, since the appellant Standard Oil Company had elected to proceed before the Commission, it was precluded from resorting to

the alternative procedure, the Court said in effect (241) that, while it was true that, by the suit, appellant sought to enjoin and set aside the Commission's order, this was "only as a preliminary step toward obtaining, by a decision upon the merits of the claims, the same relief it failed to secure from the Commission"; that that was made clear by the prayer of the bill, asking the Court to direct the Commission "to grant the prayer of the complaint; find that petitioner had been overcharged to the extent set forth; and order a further hearing, if necessary, to determine the amount to be paid by way of reparation." "It is of no importance," the Court said, "that the adjudication sought is to take the form of a direction to the Commission to grant the prayer of the complaint filed before that body, etc., instead of a plenary judgment to the same end, for the prayer in that form is nothing less than an attempt to avoid the statute by indirection."

Appellant endeavors to distinguish the above decision and to minimize its authority on the ground substantially that, in contrast with the prayer of the Standard Oil Company's bill, the prayer of the bill it filed asked simply that the Commission's order be adjudged to be arbitrary, contrary to law and the evidence; that it be enjoined and set aside; and that the matter be remanded to the Commission for further action not inconsistent with the court's decree. But, while it is doubtless true that the prayer of the Stand-

ard Oil Company's bill was quite definite in the matter of the relief asked, and while it is plain that the decision utilized that fact in emphasizing that the prayer, in the form in which it was cast, was nothing less than an attempt to avoid the statute by indirection, it does not follow that, if the prayer had been less definite, the Court would not have still held it to be an attempt to avoid the statute by indirection.

Following the Court's decision in the *Standard Oil Co. case, supra,* there were other three-judge court cases instituted seeking the review of Commission orders denying reparation, the last of which to reach this Court being the *Ashland Coal Co. case, supra.* Similarly as appellant here, the plaintiffs in that case asked only that the Commission's order denying reparation be enjoined and set aside and the case remanded, alleging simply that the Commission's decision was arbitrary, beyond its statutory authority and without support of adequate findings. In briefs they urged: "There is no prayer before this Court that it determine either (a) whether we are entitled to reparation, or (b) the amount thereof. This Court is simply asked to determine whether the Commission acted arbitrarily or beyond its statutory power * * *." (61 F. Supp., p. 712.) The District Court, however, after discussing the election of remedy provision of section 9 and court decisions bearing thereon, including the de-

cision in the *Standard Oil case, supra,* said that it was not impressed by the attempt of the plaintiffs to distinguish those cases and to minimize their authority, and it concluded that it was without jurisdiction and that the complaint must be dismissed (p. 713).

The District Court's decision in the *Ashland Coal Co. case, supra,* was affirmed *per curiam* in 325 U. S. 840, this Court citing as authority "*Standard Oil Co.* v. *United States,* 283 U. S. 235, 240–241; *George Allison & Co.* v. *United States,* 296 U. S. 840." In citing the decision in the *Standard Oil Co. case,* it will be noted that pages 240–241 are particularly pointed to, thus making plain that the third and separate ground for that decision is referred to, namely, the ground based on the election of remedy provision of section 9.

In the *Allison & Co. case, supra,* the three-judge district court dismissed for lack of jurisdiction a suit seeking the setting aside of a Commission order which, while awarding some reparation, denied the full amount sought (12 F. Supp., p. 862, 864). And there, too, the plaintiffs insisted that they sought no reparation or damages, but merely asked annulment of part of a Commission order because arbitrary and unsupported by evidence. The court's action in dismissing the suit was based in part on the ground that the order was not reviewable because negative in character (p. 864) and in part on the said third and separate ground for the decision in the

Standard Oil Co. case, supra, namely, the ground based on the election of remedy provision of section 9. Dealing with the latter ground and speaking of the plaintiffs' contention that they sought no reparation or damages, the court said (863–864):

> * * * But it is too plain for argument that this suit was prompted by the hope that its success would pave the way for a later recovery of damages against the carrier in a larger amount than the order of November 7 permits * * *. If this court has no jurisdiction to entertain such complaint, it cannot be conferred by the devious method of assailing in one step the preliminary finding upon which the damages awarded must be computed and postponing to a later proceeding the actual prayer for additional reparation. Compare *Standard Oil Co. (Indiana)* v. *United States*, 283 U. S. 235, 241 * * *.

Contrary to appellants' assertion (Br. 50) the *Allison* decision was not rested simply on the negative order doctrine, now discredited by *Rochester Telephone Corp.* v. *United States*, 307 U. S. 125. While, as above stated, the *Allison* decision was based in part on the negative order doctrine, it is made plain both by the District Court's discussion and holding above given, and its citation of the *Standard Oil Co. case, supra,* that the decision was in addition based on the election of remedy provision of section 9. The

first ground for the *Standard Oil* decision was also the negative order doctrine, but it will be noted that, in citing that decision, the court in the *Allison & Co. case*, did not point to that ground, but to page 241, that is, to the third and separate ground for the *Standard Oil decision*.

The District Court's decision in the *Allison & Co. case, supra*, was affirmed *per curiam* in 296 U. S. 546, this Court citing as authority "*Standard Oil Co.* v. *United States*, 283 U. S. 235, 241; *Brady* v. *United States*, 283 U. S. 804." The *Brady case*, presently to be discussed, is not a so-called negative order case; and, as just pointed out, the reference to page 241 of 283 U. S. indicates reliance, not on the first, but on the third and separate ground for the *Standard Oil* decision, namely, the ground based on the election of remedy provision of section 9.

Thus, although, similarly as in the case of appellant, the prayers of plaintiffs' bills in both the *Ashland Coal Co. case* and the *Allison & Co. case* sought no reparation, but merely asked that the orders denying reparation be set aside as arbitrary etc., and the matters remanded to the Commission, still the plaintiffs' suits were governed by the decision in the *Standard Oil Co. case, supra*. That is to say, the said plaintiffs, having elected to bring their claims for damages before the Commission by complaint, they were precluded from resorting to the alternative procedure of actions in the district courts and could not

"avoid the statute" by bringing three-judge court suits to enjoin and set aside the orders.

Appellant contends, apparently (Br. 48–49), that where the claims for damages require preliminary determinations of administrative questions the claimants must seek recovery by complaint before the Commission and have no real election to proceed in the district courts. The first answer to this, it would appear, is that the court decisions referred to and others would hardly have been predicated on the ground that there was such an election if none existed in fact. The second answer is that, although shippers, for the reason that such procedure is more convenient or for other reasons, generally proceed before the Commission for awards of damages, nevertheless they do, of course, have an election to bring actions in the district courts for such damages. Such actions may be brought after obtaining the necessary administrative findings from the Commission (*Geo. A. Hormel & Co.* v. *C. M. & St. P. Ry.*, 283 Fed. 915, 918, cited in the *Standard Oil Co. case, supra*), or they may be brought in court in the first instance, asking the court to stay its hand until such findings have been obtained. *Mitchell Coal Co.* v. *Penna. R. Co.*, 230 U. S. 247 and other decisions.

III

Appellants' suit was properly dismissed for the still further reason that the District Court's

jurisdiction to enjoin and set aside Commission orders did not extend to orders granting or denying claims for damages against the railroads. *Brady* v. *United States*, 43 F. 2d 847, affirmed *per curiam*, 283 U. S. 804. In the *Brady case*, similarly as in the *Allison & Co. case, supra*, the three-judge court was asked to enjoin and set aside a Commission order which, while granting some damages, failed to award the full amount sought by the shipper. The court, however, although holding that it was without jurisdiction did not rest its decision on the election of remedy provision but on broader grounds. That is to say, while it gave consideration to the fact that the Act contained provisions specifically dealing with reparation orders and suits thereon in court as distinguished from Commission orders of other kinds and the court procedure for the enforcement or enjoining thereof, the conclusion the court reached from this and the nature and history of the provisions was that its jurisdiction "to enjoin and set aside" was never intended to attach to Commission orders relating to reparation.

As above shown, this Court in affirming the *Allison & Co. case, supra*, cited the *Standard Oil Co. case, supra*; and its *per curiam* decision (283 U. S. 804) affirming the district court's decision in the *Brady case, supra*; and in affirming the later *Ashland Coal Co. case, supra*, the Court cited the *Standard Oil Co. case, supra*, and its

per curiam decision affirming the *Allison & Co. case, supra.*

Contrary to appellants' apparent contentions (Br. 37, 48, 51) this Court's decisions in the *Rochester Telephone Co. case; supra*, and *El Dorado Oil Works* v. *United States*, 328 U. S. 12, did not disturb the decisions in any of the above cases. In fact, the Court, in overturning in the *Rochester Telephone Co. case* the doctrine of non-reviewability of negative orders, makes special mention of the *Standard Oil Co. case*, saying that, though there it had held not reviewable a Commission order denying reparation "the main basis of the decision was not the 'negative order' doctrine but the statutory scheme dealing with reparations." (307 U. S., p. 140, note 23.) And there is nothing in the Court's decision in the *El Dorado Oil Works case, supra*, indicating that the Court considers that the statutory scheme dealing with reparations is no longer governing. The Commission's determinations, held to be reviewable in that case, related, not to claims for reparation against the railroads, but to administrative questions which, as shown in appellants' brief, arose in an action in assumpsit brought by the Oil Works against the American Tank Car Corporation to recover money claimed to be due under a car-leasing contract with that corporation. In its petition filed with the Commission, the Oil Works did not ask for an award of reparation

against the railroads but, consistent with the questions arising in the court action, simply asked for an order holding that Car Company could pay over to Oil Works the car mileage allowances collected from the railroads without violating the Elkins Act and that the payments would not constitute rebates or concessions. Indeed, it would appear that at the time the petition was filed any claim by the Oil Works against the railroads for reparation was barred by the statute.

On the Merits

I

Contrary to appellant's allegations the railroads' failure to supply wharves and perform handling service at Army Base Piers 1 and 2, or in lieu thereof to pay appellant allowances, was not an unreasonable or otherwise unlawful practice. Appellant stresses the fact (Br. 67) that at Norfolk the railroads have for many years treated the providing of pier facilities and handling service as included in the export and import rates, but it, at the same time, bases its contentions on its entitlement to the same treatment as is accorded private shippers (R. 92). At the public commercial piers at Norfolk, that is, at piers operated by public wharfingers, the railroads assume or absorb (and thus relieve shippers of) the charges of such operators for wharfage and handling service, the latter, however, only as to the carload freight above de-

scried (pp. 5–6). At private piers, that is, piers operated by shippers of the freight, the railroads do not at Norfolk, or other ports, pay the shippers allowances (out of the rates) for wharfage and doing their own handling.

Appellant questions (Br. 66) the Commission's finding (R. 94) that "Providing a wharf and handling the freight at (appellant's) piers are not transportation but merely facilities provided and work done by a shipper for himself on his own property at his own convenience and expense before or after the transportation is performed"; it insists that, on the contrary, the providing of piers and handling service (unloading or loading) in respect of freight in export or coastwise movement is in all cases the legal duty of the railroads, as much so as "their legal duty to provide line-haul service"; and it contends, apparently (Br. 66–67), that this view is confirmed by the fact that the Commission, in distinguishing public piers from appellant's piers, found that "The wharfage and handling at defendants' public commercial piers are transportation provided by them for the shippers" (R. 93).

At the public commercial piers at Norfolk to which appellant refers, the railroads were by their tariffs (which offered to absorb the wharfage and handling charges of the pier operators, agents of the railroads) holding out as open to all shippers over their lines the piers and handling service as facilities and service for which no

charge would be made other than as included in the line-haul rates. This was true, too, of the Army Base Piers 1 and 2 at the time when those piers were operated by Transport Terminal Corporation. But, after the lease of the piers to that corporation was terminated and the Army took over their operation for the movement of military traffic, it was no longer possible for the railroads to hold out to all their shippers even that their freight would be moved over the Army Base piers at all. Of necessity and as shown by the evidence (see page 10, *supra*), the use of the piers permitted by the Army for commercial freight was very limited. Accordingly, after the Army took over the operation of Army Base Piers 1 and 2 the situation was not in the least like that obtaining when the piers were operated by Transportation Terminal Corporation and not in the least like that obtaining at the public commercial piers at Norfolk.

Moreover, there were other circumstances and conditions in connection with the Army's operation of the Base Piers which made the situation, not only unlike that at the public commercial piers, but unlike any situation where the railroads could be under any transportation obligation whatever, either of performance or payment of allowances. The operations had to be and were conducted under the rigid control and direction of the Army. There was no "room" for

operation at carrier convenience, but only to meet the convenience and urgent needs of the Army. In these circumstances, and as found by the Commission, transportation ended on the tracks (short of the piers) designated by the Army. Further, when the Army took over the piers, it notified the railroads that they would be managed and operated by the War Department and shortly thereafter asked the railroads to amend their tariffs so as to provide for an allowance (wharfage and handling) to the Government. Subsequently, as stated by the Commission, the appellant indicated a willingness to have the railroads do the work and to let them have its civilian force, but

> recognized that the civilian force was inadequate and that the defendants could not get the additional manpower to handle peak loads. Troops would have had to be used, and obviously, anything but operation by complainant was impractical.

It seems clear that the railroads' failure or refusal to undertake the work was well grounded in reason and that it was under no transportation obligation either to provide wharfage or handling service. As found by the Commission, the "providing a wharf and handling the freight at complainants' piers are not transportation but merely facilities provided and work done by a shipper for himself on his own property * * *."

II

Contrary to appellant's allegations, the railroads' failure to provide wharfage and handling service or, in lieu thereof, to pay allowances did not result in unjustly discriminatory rates charged appellant. As pointed out by the Commission, as a result of the Army taking over the Army Base terminals and piers and their management and control, the traffic, when delivered on tracks in the terminals designated by the Army, passed from the custody of the railroads into the possession of its owner, the Government. In such circumstances the traffic was not export in the usual sense and except for the special tariff provision above referred to (p. 10) would not have been entitled to the export basis of rates.

Appellant could only have been subjected to unjust discrimination violative of section 2 if the railroads' said failure to pay allowances, etc., had resulted in their charging it a greater compensation than charged other shippers for like service in the transportation of a like kind of traffic under substantially similar circumstances. The evidence established that the railroads did not pay allowances to private shippers for wharfage or for handling export freight and that they did not perform the services on private piers. It also established that, in contrast to operations at public commercial piers, appellant took possession of its traffic at the Army Base terminals and

thereafter managed, directed and controlled the movement thereof, and the handling service. As found by the Commission:

> "the freight of other shippers (that is, at the public commercial piers) which receives the unloading service is not "like traffic" and, if handled in the same manner as the complainant's freight, the export rates would not be accorded it, much less the accessorial service. If anything, the complainant is being favored, but, of course, this is not unlawful under the circumstances.

III

Contrary to appellant's contentions the Commission's finding that such of the railroads' tariffs as remained for varying periods unchanged after the Army took over the Base piers did not include wharfage or handling was wholly sound. As appellant points out (Br. 72) the tariffs of the line-haul carriers that were not changed continued to provide substantially that, at Transport Terminal Corporation, wharfage and handling charges, as published in the Belt Line's tariff will be included in the transportation rates applicable to or from Norfolk, Va., on the following traffic moving in connection with the Virginian (or other) railroad through the above terminals. The Commission considered that, following termination of the lease to Transport Terminal Corporation and its consequent discontinu-

ance of operation of the Army Base piers, the tariff provision in question became meaningless. It said (R. 103):

> The reference in the tariffs in some instances was to the "terminals" and in other instances to the "facilities" of the Transport Trading and Terminal Corporation, but no mention was made in those tariffs to Army Base Piers 1 and 2 by that name. In order to sustain the complainant's contention, therefore, it would be necessary to read into the tariffs words which were not there.

It would seem that the Commission's construction was the only one that could be given the tariffs; and, in this connection, it will be recalled that, when the Army took over operation of the piers, what it asked of the railroads was that they amend their tariffs so as to provide for payment to petitioner of allowances, 1 cent per 100 pounds for wharfage and 3 cents for handling. And it will also be recalled that complainant, in praying the Commission for future relief, asked the Commission to establish (presumably in their tariffs) and pay to it allowances for wharfage and handling, all of which confirms the Commission's ruling. Another thing is that when Transport Terminal Corporation was operating the piers, the charges of that operator which the railroads assumed and paid were compensation paid their agent, the public pier operator. They were not allowances within section 15 (13) and cer-

tainly this works against any construction that would treat the provisions for payments to Transport Terminal Corporation as allowances which the tariffs required be paid the petitioner, shipper, or owner of the property transported.

IV

Contrary to appellant's contentions the railroads' failure to provide wharfage and perform handling at Army Base Piers 1 and 2 or, in lieu thereof, to pay the Government allowances did not result in unreasonable rates charged the Government. Due to severe competition for export traffic with Baltimore and other ports at shorter distances from the important origins, the export rates to Norfolk were depressed to a point well below the level of reasonable rates. The according of the allowances claimed to be the railroads' legal duty would, in effect, have depressed the rates to a still lower level. As already shown, the railroads' special tariff provision providing for the low export basis on traffic moving through Army and Navy bases was, in the circumstance of its handling, an in effect concession accorded the Government. Whatever further concessions the railroads might have accorded the traffic, certainly the Commission, acting on the ground of unreasonableness, is without authority to order action having the effect of further reducing rates already well below the level of reasonable maxima.

ARGUMENT.

Jurisdictional

I. The Urgent Deficiencies Act, which, in providing for court review of Commission orders, requires that the suits be brought against the United States, neither contemplates nor permits the bringing of such suits by the United States

As above shown, in its complaint before the Commission, appellant, the United States, alleged that, by reason of the railroads' failure to supply wharfage and perform handling at Army Base piers 1 and 2, or to pay it an allowance in lieu thereof, it had been subjected to an unreasonable practice, resulting in unreasonable and unjustly discriminatory rates; it asked that the railroads be required to establish and pay it in the future a reasonable allowance for furnishing the wharfage and performing the handling at said piers; and, for the past, it asked an award of damages (R. 144). Based upon the findings outlined in the preliminary statement, the Commission dismissed the complaint; and in the suit brought in the District Court, the United States asked that the Commission's order denying the award of damages be enjoined and set aside. By the complaint instituting the suit, the Commission as well as the United States was named a defendant.

Under section 9 of the Interstate Commerce Act, it was open to the United States to have brought its claim for damages either by complaint made to the Commission or by suit in a federal

district court, but it was without right to pursue both said remedies and had to elect which one of the two methods of procedure it would adopt. Speaking of this, the District Court, in its decision, said (78 F. Supp. 580, 582):

> In other words, the law accords two alternative remedies to any person who is damaged by any action of a common carrier violative of the Interstate Commerce Act. The injured party either may make a complaint to the Interstate Commerce Commission or many bring an action for damages against the carrier in the District Court of the United States. The two remedies are mutually exclusive. In this instance, the United States did not choose to bring suit against the railroads in the District Court of the United States, but elected to present a complaint to the Interstate Commerce Commission. The United States now seeks a review of the adverse decision of the Commission by an action brought before a three-judge court.

Continuing, the Court pointed out that the statute expressly provides, as to such court review, that the suits shall be brought against the United States; that, moreover, in such suits, the United States was not a mere nominal party defendant, for the legislative history showed that Congress deliberately and intentionally provided that the suits should be brought, not against the Commission, but against the United States; that, while

the Commission is given the right to intervene, there is no authority or warrant in law for making it a party defendant originally; that it was thus confronted with an anomaly—a suit by the United States against the United States (p. 582); that the principle that no person may sue himself was applicable to the United States; that such principle was but an application of the general doctrine that federal courts may deal only with actual cases of controversies; that it was of the view, therefore, that the suit could not be maintained, as the United States was both plaintiff and defendant (p. 183); that, as to the suggestion of the United States that, unless it might maintain the suit, it was without remedy, such contention was hardly well founded, since the statute gave it the alternative remedy of bringing the suit against the carriers in the federal district court; that, under any circumstances it (the Court) must enforce the will of Congress which clearly did not contemplate or intend to permit a suit by the United States against the United States to review an order of the Commission; and that "If the situation here presented is a *casus omissus*, the remedy lies solely with the legislative branch of the Government."

Appellant, the United States, in support of its contention that the District Court's decision is erroneous, relies in important measure upon *United States* v. *Public Utilities Commission* (Court of Appeals, Dist. of Columbia), 151 F. 2d

609, which sustained the right of the United States, as a customer of the Potomac Electric Power Company, to appeal to the District Court (D. C.) from an order of the appellee Commission fixing rates for sale of electric energy. The right to so appeal depended on whether the United States, as such customer, was "a person affected by" the order within the meaning of the statute and intent of Congress. It was held that it was, the court saying among other things (613–614), "The word 'affected' as used in the present statute seems to have been chosen by Congress, deliberately, to expand the privilege of complaint and appeal beyond that contemplated by words which it has used in other statutes, and beyond the conventional tests used in equity suits seeking restraint of governmental action * * *."

In contrast to the above, the very fact that the statute here makes the United States the defendant in suits to set aside orders of the Interstate Commerce Commission shows, it would seem, that Congress did not intend that it might as plaintiff institute such suits against Commission orders. The status of the United States as defendant in the suits is not that of a mere formal, or nominal, party defendant. The statute itself and this Court's decisions dispute any such view; and, as emphasized in the District Court's decision here on appeal, the legislative history shows that Congress, after full consideration thereof, including consideration of efforts

made by members of both houses to have the Commission substituted as such defendant, deliberately enacted the provision requiring that the suits be brought against the United States.

The provision that suits to enjoin, suspend or set aside Commission orders shall be brought against the United States was first introduced into the law by the Commerce Court Act of 1910. 36 Stat. 539, 542. Theretofore such suits had been brought against the Commission, and it was for the particular purpose of terminating that situation that the said provision was inserted in the bill to create the Commerce Court.[14] Objections to the provision were raised by members of both Houses who, being apprehensive that the Attorney General might not always vigorously defend Commission orders, favored the amending of the bill so as to provide that the suits be brought against the Commission and be defended by its own counsel. Attempts to amend the bill to so provide were made but were defeated,[15] the only success attending the attempts being the securing of compromise provisions, authorizing, as matter of right, the Commission and any party in interest to a Commission proceeding to intervene in any such suit and to "prosecute, defend,

[14] Senate Report 355, 61st Cong., 2d Sess., p. 6; House Report 923, 61st Cong., 2d Sess., pp. 3, 7, 159.

[15] 45 Cong. Rec. 5514–5523, 6346–6347, 6389–6409, 6441–6462.

or continue said suit * * * unaffected by any action or nonaction by the Attorney General.[10]

Accordingly, since in the face of strong opposition and attempted amendments which would have required that the suits be brought against the Commission, Congress deliberately enacted the provision requiring that the suits be brought against the United States, it seems evident that the statute does not permit of a procedure whereby the Commission would, in effect, be substituted for the United States as the defendant of the suit brought. And yet that is plainly the effect of the procedure here followed, whereby the United States, after naming the Commission as co-defendant in the bill, on its own behalf as defendant filed a neutral answer (R. 118–119), neither admitting nor denying the allegations of the bill, but leaving the defense of the suit for the Commission. Moreover, since Congress, dealing specifically with the Commission's status in the suits, deliberately and advisedly fixed such status as that, not of a defendant or co-defendant, but simply an intervener, it is further evident that even the first step in the United States said pro-

[10] The full text of the provision with respect to the Attorney General reads "and the Attorney General shall not dispose of or discontinue said suit or proceeding over the objection of such party or intervenor aforesaid, but said intervenor or intervenors may prosecute, defend, or continue said suit or proceeding unaffected by the actio or non-action of the Attorney General." 28 U. S. C., sec. 45a. See *I. C. C.* v. *Oregon-Washington R. Co.*, 288 U. S. 14, 23–25.

cedure—that of naming the Commission as well as the United States a defendant in the bill—was in conflict with the statute. True, the Commission made answer to the bill, but if, as shown by the statute and held by the District Court, there was no warrant in law for naming the Commission a co-defendant, such answer filed by the Commission can at best be regarded only as an intervention. But since, before the Commission could by intervention become a party defendant, a valid suit must have first been begun, it is difficult to grasp just how the Commission's intervention could be urged as supplying the necessary actual defendant to make the suit valid.

Apparently, the thought of appellant United States that it might bring the suit as plaintiff, if naming the Commission as co-defendant and thereafter in its own capacity as defendant filing a neutral answer, rests largely on the fact that the Commission, when intervening as defendant in a suit to set aside one of its orders, is authorized to continue the defense thereof unaffected by the action or non-action of the Attorney General." This is shown by its reference (Br. 22, 35) to a number of suits to set aside Commission orders in which it (the United States) also declined to defend, or to further defend, the orders, either by similarly taking a neutral position or other non-action, or by filing

ested could, by intervention, become parties defendants and, once defendants in suits validly brought and instituted, could continue the defense thereof "unaffected by the action or nonaction of the Attorney General." On the other hand, since here the suit against the United States to set aside the Commission's order was brought by the United States as plaintiff, its procedure of adding the Commission as co-defendant and thereafter in its capacity of defendant filing a neutral answer declining to oppose the bill had an entirely different effect. Not only was the effect to substitute the Commission for itself as defendant, but by the very fact it deemed there was need for such procedure the United States seemingly recognized the incongruity of any attempt to conduct the defense itself. Cf. *Globe & Rutgers Fire Ins. Co.* v. *Hines*, 273 Fed. 774, 777.

Appellant United States urges, however (Br. 27, 29), that it properly joined the Commission

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olina v. *United States*, 325 U. S. 507. (Suit by State Commission in which Price Administrator intervened as plaintiff. Following such intervention the United States filed amended answer taking a neutral position); *McLean Trucking Co.* v. *United States*, 321 U. S. 67. (Suit by motor carrier in which the Secretary of Agriculture intervened as a party plaintiff. United States filed answer, confessing error); *I. C. C.* v. *Mechling*, 330 U. S. 567. (Suits brought by water carriers and Secretary of Agriculture. United States filed answer confessing error. The District Court set aside the Commission's order and, on the appeal to this Court, the United States and the Secretary of Agriculture presented by brief and orally joint argument urging affirmance.)

as co-defendant; that the railroads intervened; that the actual controversy was between it as shipper plaintiff, contesting the order, and the railroads, both the railroads and the Commission being authorized to continue the defense of the order unaffected by its action or inaction in its capacity of defendant; and that this being the situation, "it would be absurd to apply the alleged rule that the United States may not sue itself." Continuing, appellant says (Br. 29):

> The matter is a practical one, which should be governed by realities and not by technicalities or legal fictions. And the practical fact here is that the United States is the plaintiff and in no real sense a defendant.

But appellant, in reaching out to the railroads to supply an actual controversy giving validity to the suit it brought as plaintiff, is pointing to a controversy which was not in the suit at the time when brought or, for that matter, until after the pleadings were joined (if that is the correct term here) by the filing of the United States' neutral answer declining to defend; for the railroads' intervention (R. 119–123) followed the filing of that answer (R. 118). It cannot be gainsaid that, in suits brought by plaintiffs contemplated by the statute, the only need for controversy is the controversy between such plaintiffs and the United States; for, in suits to set aside Commission orders, the only defendant the statute provides for is the United States. Cf.

answers or other action confessing error in the orders.[17]

But, since the suits referred to were brought by plaintiffs other than the United States it is evident that, even though, by its filed answers or other steps, the defendant United States declined to defend the orders, or to further defend them, the suits were, when and as brought, bona fide suits against the United States, presenting for decision actual controversies between such plaintiffs and the United States. All that being so, it followed that the Commission and others inter-

[17] *I. C. C. et al.* v. *Oregon-Washington R. R. & Navigation Co.*, 288 U. S. 14. (Suit by rail carriers. United States refused to appeal from adverse decision of District Court); *Mitchell* v. *United States*, 313 U. S. 80. (Suit by negro passenger. The United States defended the Commission's order in the District Court, but on the appeal filed a memorandum taking the position that the Commission and District Court had erroneously applied the law, p. 92); *I. C. C. et al.* v. *Columbus & G. R. Co.*, 319 U. S. 551. (Suit by rail carrier. The United States declined to appeal from adverse decision of District Court); *I. C. C.* v. *Railway Labor Assn.*, 315 U. S. 373. (This suit is not cited in appellant's brief. It was brought by the Railway Labor Executives Association. The United States declined to appeal from adverse decision of District Court); *I. C. C. et al.* v. *Inland Waterways Corp.*, 319 U. S. 515. (Suit by water carrier in which the Secretary of Agriculture intervened as a party plaintiff. The United States declined to participate, in effect taking a neutral position, p. 683); *I. C. C. et al.* v. *Jersey City*, 322 U. S. 503. (Suit by Jersey City in which Price Administrator intervened as a party plaintiff. The United States filed a neutral answer. The District Court set aside the Commission's order and on the appeal to this Court, the United States filed a memorandum urging affirmance, p. 504); *North Car-*

United States v. *Idaho*, 298 U. S. 105, 109. Therefore, if here in the Act's contemplation the United States was a plaintiff who could bring the suit against the United States to set aside the Commission order, it would have had no occasion to look to the railroads to supply a controversy or any need to add the Commission as co-defendant and by neutral answer to in effect eliminate itself from the case as defendant.

Following the statements in appellant's brief, above quoted, the brief says the ultimate question here is statutory, "and there is nothing in the statute, either explicitly or implicitly, which denies to the United States the right to obtain review of adverse orders of the" Commission. However, the statute does and did plainly and explicitly provide that the suits shall be brought against the United States, and therefore just as plainly did not permit the United States' procedure whereby, in order to gain standing to bring the suit as plaintiff, it in practical effect, substituted the Commission for itself as the defendant of the suit brought. Borrowing from appellant's statement that the question should be governed by realities, just that was the real practical effect of the procedure. As above shown, appellant says "the practical fact here is that the United States is the plaintiff and in no real sense a defendant." If appellant means by this that at some time after the inception of the suit it became established as a plaintiff which was

not also a real defendant, then at the time it brought the suit and for a period after the suit was one in which it was both plaintiff and defendant. If, on the other hand, it means, as appears to be the case,[18] that from the beginning its status as defendant was such that, in bringing the suit, it might add the Commission as co-defendant and itself file neutral answer, declining to defend, then, it is evident there never was instituted an actual suit against the United States as a real defendant—a defendant who it was ever intended should defend.

As above shown, both by its terms and as confirmed by its legislative history, the statute requires that suits to set aside Commission orders shall be brought against the United States. And further confirming the statute's requirement, decisions of this Court hold that suits to set aside Commission orders are essentially suits against the United States—that the United States is an indispensable defendant. *United States* v. *Griffin*, 303 U. S. 226, 238; *United States* v. *Idaho*, 298 U. S. 105, 109; *Illinois Central R. Co.* v. *Public Utilities Comm.*, 245 U. S. 493, 503; *Lambert Co.* v. *Balto. & Ohio R. Co.*, 258 U. S. 377, 382. And, while such holding does not mean that the Commission, when intervening in a suit validly brought, could not continue the defense thereof unaffected by the United States' failure to de-

[18] See appellant's brief, p. 24, note 8.

fend, it does mean at the very least that, in order that a suit be valid at its inception or at any time, it must be a suit brought against the United States as a real, and not a mere, nominal defendant.

II. Appellant, Having Elected To Bring and Prosecute Its Claim for Damages by Complaint Before the Commission, It Was Precluded by Section 9 of the Act From Thereafter Resorting to the Alternative Procedure of a Suit in a Federal District Court, Whether Regularly or Specially Constituted

While appellant's complaint before the Commission was concerned with rates or practices for the future, its petition before this Court relates only to the Commission's denial of reparation or damages on past shipments moved over Army Base piers 1 and 2 up to the time the Army ceased its operation of the piers. In its complaint made to the Commission, appellant alleged as a basis for reparation, that, by reason of the railroads' failure to supply the wharfage and perform the handling service at those piers, or to pay it allowances in lieu thereof, it has been subjected to an unreasonable practice and the payment of rates that were unjustly discriminatory, unreasonable and inapplicable,[19] and it prayed that an order issue commanding the railroads to

[19] The issue of "inapplicability" was not raised by the complaint but was urged during the proceeding. On the other hand, the allegation that the rates that the Government paid were unreasonable or excessive seems not to have been much pressed (R. 559).

pay to it such amount as the Commission shall determine it is entitled to receive as an award of damages. Following full hearing, the Commission found, as above shown, that the railroads had not violated the Act in any respect and, therefore, that an award of damages was not due.

Section 8 of the Act provides substantially that any common carrier by railroad which shall do any act or thing prohibited or declared unlawful in the Act shall be liable in damages to the persons injured thereby. Section 9 of the Act provides that any person claiming to be so damaged may either make complaint to the Commission or may bring suit in a federal district court for the recovery of the damages for which the carrier may be liable under the Act, but further provides that "such person or persons shall not have the right to pursue both of said remedies, and must in each case elect which one of the two methods of procedure herein provided for he or they will adopt." Section 16 of the Act authorizes the Commission to award damages upon complaints filed with it. Covering cases where the awards are not complied with by the carriers, the section also provides for actions thereon in the Federal or State courts.

It is plain under the language of section 9, above quoted, that one who has sought, and failed to obtain, an award of damages from the Commission, cannot thereafter bring suit in a federal district court to recover damages arising out of

the same cause of action. This is indisputable so far as an ordinary suit in a district court is concerned. *Hormel & Co.* v. *Chicago, M. & St. P. Ry.*, 283 Fed. 915, 918 (C. C. A. 8);[20] *Bartlesville Zinc Co.* v. *Mellon*, 56 F. 2d 154, 156. And, since the provisions of Sections 9 and 16 of the Act are provisions specifically directed to the governing of the procedure for recovery of damages for violations of the Act, it is equally evident that their objectives may not be avoided through the procedure of a suit before a 3-judge district court, asking that a Commission order denying an award be set aside as unlawful, contrary to the evidence, etc., and that the case be remanded. *Standard Oil Co.* v. *United States*, 283 U. S. 235; *Ashland Coal & Ice Co.* v. *United States*, 61 F. Supp. 708, 709, affirmed *per curiam*, 325 U. S. 840; *Atlantic Lumber Corp.* v. *Southern Pac. Co.*, 47 F. Supp. 511, 514.

The *Standard Oil case, supra*, was one before a 3-judge district court convened under the Urgent Deficiencies Act and involved a suit to set aside a Commission order denying an award of damages for alleged overcharges, the claimant contending that the rates exacted by the carriers were not the rates legally applicable under the tariffs. In affirming the District Court's decree dismissing the bill for lack of jurisdiction, this Court rested its decision on three grounds, the

[20] Cited in *Standard Oil Co.* v. *U. S.*, 283 U. S. 235, 241.

first of which was that, since the Commission's denial order was negative, it was not subject to review by the courts, citing *Procter & Gamble Co.* v. *United States*, 225 U. S. 282, and other decisions ruling that negative orders of the Commission were not reviewable.[21] Secondly, the Court held (pp. 238–240) that the case before the Commission had not, as contended, involved "merely the construction of the written words employed in a rate tariff—a simple question of law—but required consideration of matters of fact and the application of expert knowledge for the ascertainment of the technical meaning of the words and a correct appreciation of a variety of incidents affecting their use"; that that being so, the questions of rate applicability under the tariffs were for the Commission and, in the interest of uniformity, must be left to that body; and that (p. 240):

[21] Subsequent to the *Standard Oil case*, the Court rendered its decision in the *Rochester Telephone case*, 307 U. S. 125, whereby it overturned the doctrine that the courts were without jurisdiction to review negative orders. But, in the latter decision, the Court at the same time made clear that its decision in the *Standard Oil case* was primarily based on section 9 of the Act rather than the fact that the order involved was negative. Thus in a footnote the Court said (307 U. S., at p. 140):

"*Standard Oil Co.* v. *United States*, held not reviewable the action of the Commission refusing to grant reparation but the main basis of the decision was not the 'negative order' doctrine, but the statutory scheme dealing with reparations."

There being nothing to suggest that the Commission acted arbitrarily or without evidence to support its conclusions, or that it transcended its constitutional or statutory powers, *Interstate Commerce Comm. v. Union Pacific R. Co.*, 222 U. S. 541, 547, it follows that, apart from what is said in support of the ground first above stated, the order of the Commission was not susceptible of review by the courts; citing cases.

Directly following the above, the Court said (pp. 240–241):

Third. But putting the foregoing grounds entirely aside, and assuming the correctness of appellant's contentions to the contrary, nevertheless, having regard to the remedy invoked and the relief sought by the petition, we think the district court was without jurisdiction. Section 9 of the Interstate Commerce Act, c. 104, 24 Stat. 379, 382; U. S. C., Title 49, Sec. 9, provides that a claim for damages against a common carrier may be brought before the Commission by complaint, or by an action in a federal district court of competent jurisdiction, but that the claimant or claimants, "shall not have the right to pursue both of said remedies, and must in each case elect which one of the two methods of procedure herein provided for he or they will adopt." Having elected to proceed and having proceeded to a determination before the Commission, appellant was, by force of this provision, precluded from seeking repara-

tion upon the same claims by the alternative method of procedure. Compare *Geo. A. Hormel & Co.* v. *Chicago, M. & St. P. Ry. Co.*, 283 Fed. 915, 918.

It is true that appellant sought to enjoin and set aside the order of the Commission, but only as a preliminary step toward obtaining, by a decision upon the merits of the claims, the same relief it failed to secure from the Commission. This is made clear by the prayer of the petition, already quoted, namely, that the Commission be directed by the court to grant the prayer of the complaints; find that petitioner has been overcharged to the extent set forth; and order a further hearing, if necessary, to determine the amount to be paid by way of reparation. It is of no importance that the adjudication sought is to take the form of a direction to the Commission to grant the prayer of the complaints filed before that body, etc., instead of a plenary judgment to the same end, for the prayer in that form is nothing less than an attempt to avoid the statute by indirection. In substance and in principle the claim before the Commission and the claim before the court were the same, and the district court was without authority to entertain the controversy. It is hardly necessary to add that, since section 9 contemplates that the jurisdiction in such cases shall be exercised by the federal district courts as ordinarily constituted, the spe-

cially constituted court is without jurisdiction to dispose of an action under that section even if brought in the district court in the first instance.

The prayer of the petition in the above case, it will be noted, did not go so far as to ask the district court itself to award damages but, instead, asked it to direct the Commission "to grant the prayer of the complaints; find that petitioner has been overcharged to the extent set forth, and order a further hearing, if necessary, to determine the amount to be paid by way of reparation." However, the Court considered that the form in which the prayer was thus cast was, "nothing less than an attempt to avoid the statute by indirection."

The *Ashland Coal & Ice Co. case, supra* (1945, 61 F. Supp. 708), was also one instituted before a 3-judge court and involved a suit to set aside that part of a Commission order denying reparation for the past. The Commission had found that certain rates on coal were unreasonable and ordered a reduction for the future; "as to the past, however, the Commission decided that these rates were not unreasonable." (P. 709.) The plaintiffs in court, shippers, contended substantially that the Commission's decision as to the rates for the past was arbitrary, beyond its statutory authority and without support of adequate findings. Giving consideration first to the question of its jurisdiction to entertain the suit, the Court reviewed

the provisions of sections 8, 9 and 16 of the Act, cited decisions establishing that where a claimant had sought, and failed to obtain reparation, from the Commission, it could not subsequently sue on the same claim in an ordinary district court and then said (p. 710):

> This brings us to the jurisdictional problem of the case before us. Can a party who has sought reparation before the Commission and has been denied such reparation by the Commission, bring a civil action (under the Urgent Deficiencies Act) in a specially organized three-judge district court for the purpose of setting aside the Commission's order? Section 9 of the Interstate Commerce Act, 49 U. S. C. A. Section 9, we think, as interpreted by the federal courts, is an effective bar to such a civil action.
>
> Mr. Justice Sutherland seems to have dealt rather effectively with this problem in the closing words of his opinion in *Standard Oil Co.* v. *United States*, 283 U. S. 235, 240, 241, * * * *.

Following the above, the Court quoted that portion of the opinion in the *Standard Oil Co. case* which is set out above. Next it mentioned that, while, in the *Rochester Telephone Co. case*, 307 U. S. 125, the Supreme Court repudiated the doctrine of nonreviewability of negative orders, it was at the same time careful to distinguish its prior decision in the *Standard Oil Co. case* by saying that, though there it had held not reviewable

a Commission order denying reparation, "the main basis of (that) decision was not the 'negative order' doctrine but the statutory scheme dealing with reparations." Thereafter, the Court in the *Ashland case* quoted from other decisions, including *Brady v. Int. Comm. Com.*, 43 F. 2d 847 (affirmed *per curiam*, 283 U. S. 804), and, referring to the *Standard Oil, Rochester Telephone* and other cases quoted from, said (pp. 712–713):

> We are not impressed by the attempt of the plaintiffs to distinguish these cases and to minimize their authority. To us they seem controlling.
>
> Nor can we find any merit in the contention of plaintiffs that this is not a suit to set aside an order of the Commission denying reparation. In their brief we find:
>
> "There is no prayer before this Court that it determine either (a) whether we are entitled to reparation, or (b) the amount thereof. This Court is simply asked to determine whether the Commission acted arbitrarily or beyond its statutory power in deciding upon the *same mass of evidence* that rates were *not* unreasonable prior to a certain date, but that they are unreasonable subsequent to such date and whether the decision of the Commission contains the essential findings of preliminary fact to sustain these divergent views. As a necessary corollary this suit raises the further question whether the Commission has wrongfully assumed a power of discre-

tion in respect of determining past unreasonableness. If this Court finds with us, it is asked to remand the case for further action within the framework of power properly exercised."

If to this contention any answer be necessary beyond its mere statement, that answer, we think, is found in the words of Circuit Judge Swan, in *George Allison & Co. v. United States*, D. C., 12 F. Supp. 862, 863, 864:

"Plaintiffs, on the other hand, insist that they seek no reparation or damages, but merely ask annulment of part of an affirmative order arbitrarily fixing as reasonable the rates and charges attacked. The petition is framed so as to be consistent with this contention; as has been stated, plaintiffs request the annulment of the parts of the order of November 7, 1933, already indicated, and there is no prayer for damages or reparation. But it is too plain for argument that this suit was prompted by the hope that its success would pave the way for a later recovery of damages against the carrier in a larger amount than the order of November 7 permits. The plaintiffs, as complainants or interveners in the proceedings before the Commission, sought reparation as well as reasonable rates for the future. * * * Hence, in substance there is presented a situation wherein shippers sought reparation for excess charges exacted by a carrier, and now complain that the Commission fixed reasonable

rates for the past too high and failed to award them the full measure of damages they were entitled to. If this court has no jurisdiction to entertain such complaint, it cannot be conferred by the devious method of assailing in one step the preliminary finding upon which the damages awarded must be computed, and postponing to a later proceeding the actual prayer for additional reparation. Compare *Standard Oil Co. (Indiana)* v. *United States*, 283 U. S. 235, 241, 51 S. Ct. 429, 75 L. Ed. 999. The real inquiry is whether such jurisdiction exists."

This case was affirmed, on the strength of the *Standard Oil case* and the *Brady case, George Allison & Co.* v. *United States*, 296 U. S. 346, 56 S. Ct. 174, 80 L. Ed. 387.

We must therefore conclude that the instant case is not within the jurisdiction of our specially organized three-judge District Court. For that reason, the complaint of the plaintiffs must be dismissed.

The feature of special interest in the above case—*The Ashland Coal & Ice Co. case*—is the argument of the plaintiffs attempting to distinguish it from the earlier decisions discussed, namely, their argument that they were not asking the Court to determine whether they were entitled to reparation, or the amount thereof, but simply whether the Commission had acted arbitrarily, beyond its statutory power or without adequate findings, and, if the Court found with them, to

remand the case to the Commission "for further action within the framework of power properly exercised." The first answer to this is that indicated by the three-judge court, that is, that the plaintiffs' argument supplied its own answer. For, while they were not asking the Court itself to award reparation either in a fixed or an undetermined amount, still the suit was one to set aside an order denying reparation and, if successful, would pave the way for the award which the Commission had denied. A further answer the Court said in substance was furnished by the decision in the *Allison case* (12 F. Supp. 862), from which it quoted. In that case, too, the plaintiffs similarly argued that they were not seeking, or praying for, reparation; rather, so they in effect urged, they were merely asking the court to annul, as arbitrary, that part of an affirmative order whereby the Commission found (for purposes of reparation) that the rates attacked were for the past "unreasonable only to the extent that they exceeded" certain maxima, while, for purposes of future reasonable rates, it, at the same time, fixed lower maxima (p. 863).[22] But here again the real reason for the suit was the recovery of

[22] The plaintiffs' petition charged that there was no evidence whatever to support the different finding as to the rates for the past. It prayed, in effect, that that part of the order denying the full reparation sought be annuled as arbitrary and without support in the evidence and that the proceeding be "remanded to the Commission, with directions to proceed in accordance with law" (12 F. Supp., p. 863).

reparation—the hope that it "would pave the way for a later recovery * * * in a larger amount than the order of November 7 permits. * * * If this Court has no jurisdiction to entertain such complaint, it cannot be conferred by the devious method of assailing in one step the preliminary finding upon which the damages awarded must be computed, and postponing to a later proceeding the actual prayer for additional reparation. Compare *Standard Oil Co. (Indiana) v. United States*, 283 U. S. 235, 241, * * *."

Similarly, as in the *Ashland* and *Allison* cases and others brought since the *Standard Oil Co. case, supra*, seeking the setting aside by a 3-judge district court of a Commission order denying reparation, the appellant here relies on the fact (Br. 50–51) that the prayer of the petition in the *Standard Oil case* asked the "same relief it failed to secure from the Commission," that is, it asked that the Commission be directed "to grant the prayer of the complaints filed with that body" (283 U. S., at 241). And, much as in such other cases, appellant insists that in the case at bar it sought "neither a money judgment nor an order directing the Commission to make an award," but sought "only to have the order denying relief set aside and a direction to reconsider the case in the light of the correct rule of law." However, while it is doubtless true that the prayer of the Standard Oil Company's bill was quite definite in the matter of the relief asked,

and while it is plain that the Court utilized that fact in emphasizing that Standard Oil was attempting to obtain through an order addressed to the Commission what it could not expect to obtain directly from the Court, it does not follow that, if the prayer had been less definite, the Court would not have still held it to be an attempt to avoid the statute by indirection.

As above shown, the petition in the *Ashland Coal Co. case, supra,* asked (61 F. Supp., at 712) substantially that the court determine whether the Commission had acted arbitrarily, beyond its statutory authority and without support of adequate findings and that, if it found with the petitioner, to remand the case to the Commission for further action within the framework of power properly exercised;

And the petition in the *Allison & Co. case, supra,* asked (12 F. Supp., at 863) substantially that that part of the Commission's order which denied the full reparation sought be annulled as arbitrary and without support in the evidence and that the proceedings be remanded to the Commission, with directions to proceed in accordance with law.

In the present suit the situation is practically the same, in that, while appellant's petition does not pray the Court to determine that it is entitled to reparation, or the amount thereof, it does ask (R. 71–72) the Court to adjudge that the Commission's order is arbitrary, capricious,

contrary to law and the evidence; "that a decree be entered perpetually enjoining, setting aside and annulling the said order; and that the matter be remanded to the Commission for further action not inconsistent with this Court's decree."

If there is any difference, it would seem that the prayer of appellant's petition is more definite than the others in the matter of the relief sought, since the remand to the Commission is "for further action not inconsistent with this Court's decree." This is particularly true if the relief asked of the Court is considered together with the complaint before the Commission.

The gist of appellant's complaint to the Commission was the railroads' failure, in respect of the traffic moving over Army Base piers 1 and 2, to pay it an allowance (out of the rates) of $1.00 for wharfage and $3.00 for handling (or themselves to furnish the wharfage and handling service); and such failure, it was alleged, constituted an unreasonable practice, resulting in rates that were unjustly discriminatory, unreasonable and inapplicable. And, too, the damage Division 2 considered appellant had incurred was the reasonable cost to it of furnishing such wharfage and performing such handling, which it found to have been 4 cents per 100 pounds, with interest, on traffic "in respect of which services were performed" (R. 86). Accordingly, when in its petition here, appellant prayed the Court to set aside the Commission's order denying

reparation and to remand the matter, the real relief it asked was inescapably a judgment, paving the way for the recovery of damages or reparation—quite as much so, certainly, as the relief asked in the *Ashland Coal Co. case* and the *Allison case*, just above discussed.

The decision in the *Ashland Coal Co. case* was affirmed by this Court in a *per curiam* decision, 325 U. S. 840, the Court citing as authority "*Standard Oil Co.* v. *United States*, 283 U. S. 235, 240–241; *George Allison & Co.* v. *United States*, 296 U. S. 546." True, the three-judge court in the *Ashland Coal Co. case*, not only held that it was without jurisdiction because of the election of remedy provision of section 9 of the Act, but also went on to sustain the order on the merits (61 F. Supp., at 713–715). True also, that the *Standard Oil* decision rests in part on the negative order doctrine. However, it will be noted that, in affirming the *Ashland Coal Co.* decision, the Court leaves no doubt as to the ground of affirmance; for, it not only cites as authority its prior decision in the *Standard Oil case*, but points to the particular pages to which it has reference, namely, pages 240–241, dealing with the third and separate ground for the decision, based on the election of remedy provision of section 9. And, too, it will be seen that the *per curiam* decision affirming the *Ashland Coal Co. case* also cites as authority the *Allison & Co. case*, above quoted from and discussed, which case the Court

had previously affirmed in 296 U. S. 546, citing as authority "*Standard Oil Co. v. United States*, 283 U. S. 235, 241; *Brady* v. *United States*, 283 U. S. 804."

See *Great Lakes Steel Corp* v. *United States*, 81 F. Supp. 450, 452.

Referring to the decision in the *Allison & Co. case*, appellant's brief (p. 51) says in effect that that decision rested upon the negative doctrine, thereafter set aside in the *Rochester case, supra*. It has already been pointed out that the Court's decision in the *Rochester Telephone Co. case* distinguished its prior decision in the *Standard Oil Co. case* on the ground that the "main basis of that decision was not the negative order doctrine but the statutory scheme dealing with reparations." And it will have been noted that the Court, in affirming the *Allison & Co.* decision, not only cites the *Standard Oil* decision, but the particular page (p. 241) dealing with the election of remedy provision of section 9 and where the Court stated that the form in which the prayer of the petition was cast, was "nothing less than an attempt to avoid the statute by indirection." That statement was particularly significant in connection with the *Allison & Co. case*, wherein the plaintiff urged that it was not seeking reparation but simply asking the Court to find the Commission's action arbitrary and remand the case for further action in accordance with the law. And that statement (in the *Standard Oil* decision,

page 241) was also, as above shown, equally significant in connection with the *Ashland Coal Co. case*, which clearly was the reason the 3-judge court quoted that portion of the *Allison & Co.* decision which it did quote and set out (see supra, p. 65).

True, the decision in the *Allison & Co. case* rested in part on the negative order doctrine; true, too, in contrast to the *Ashland Coal Co.* decision, both the District Court decision and this Court affirming decision in the *Allison & Co. case* were handed down prior to the overturning of the negative order doctrine. But, it will be recalled that the order in the *Allison case* was negative only in the sense that it did not grant the full relief sought. The District Court was of the view that it was, nevertheless, negative (12 F. Supp., at p. 864), but it is evident that this Court did not agree; that is to say, that its affirmance of the *Allison* decision did not rest at all on the negative order doctrine but squarely on the election of remedy provision of section 9. For, in affirming (296 U. S. 546) the said decision, the Court ignores the *Procter & Gamble case*, 225 U. S. 282, *Hooker* v. *Knapp*, 225 U. S. 302, and other negative order cases relied on by the District Court, and cites as authority only the *Brady case, supra*,[23] and the *Standard Oil case*, pointing to

[23] A case not based on the negative order doctrine and presently to be discussed.

page 241 of the latter, dealing with the election of remedy provision of section 9.

Appellant refers to the fact that the Court's *per curiam* affirming decisions were not accompanied by opinions or preceded by oral argument, but this, it is believed, gives to the decisions special force and significance. It means, it would seem, that the cases so appealed and disposed of by *per curiam* affirmances were already so well settled that all that was required were short opinions citing the Court's prior decisions governing the questions.

It should be mentioned that appellant also attempts to distinguish the *Standard Oil case* on the ground that the damages there sought were for alleged "overcharges" exacted by the carriers, raising a question of tariff interpretation usually determinable by the courts without prior reference to the Commission, whereas in the present case the damages sought were based on violations of administrative kind such as the charging, or engaging in, unreasonable or discriminatory rates or practices. In the first place, an examination of sections 8 and 9 will show that the Act does not lend itself to the attempted distinction. Section 8 makes the carriers liable in damages for any violations of the Act; and the election of remedy provision of section 9 plainly applies to complaints to the Commission and actions in the district courts for recovery of damages on account of any such violations.

Furthermore, the damages, or reparation, sought in both the *Ashland Coal Co. case* and the *Allison & Co. case* were based on alleged violations of administrative kind, that is, on rates alleged to have been unreasonable. Also, while in the *Standard Oil case*, as petitioner says, the damages sought were based on alleged overcharges, this Court held, as above shown, that the tariff question before it involved words of special or technical meaning and was generally so complex as to be an administrative question committed to the Commission.

While shippers seeking reparation generally apply therefor to the Commission, it will be realized that this method of procedure is usually the more practicable, particularly where they are at the same time asking for a reduction in rates or other future relief. This does not mean, however, that they are left without an election. Commonly, if desiring to bring court action for damages they first obtain from the Commission the administrative findings but without asking that body for damages or reparation. Cf. *Geo. A. Hormel & Co.* v. *Chicago, M. & St. P. Ry.*, 283 Fed. 915, 918; *Terminal Warehouse* v. *Penn. R. Co.*, 297 U. S. 500, 508. On the other hand, they may in the first instance bring such a court action, at the same time asking the court to stay its hand until they have obtained from the Commission the necessary underlying administrative findings. *Morrisdale Coal Co.* v. *Penna. R. Co.*,

230 U. S. 304, 314–315; *Mitchell Coal Co.* v. *Penna. R. Co.*, 230 U. S. 247, 248. Compare *Southern Ry.* v. *Tift*, 206 U. S. 428, 434–435. See also *Bell Potato Co.* v. *Aberdeen Truck Line*, 43 M. C. C. 337, 343.

III. The District Court Was Without Jurisdiction for the Further Reason That the Jurisdiction To Enjoin and Set Aside Orders of the Commission Did Not Extend to Orders of the Commission Granting or Denying Claims for Damages Against the Railroads

As above shown, this Court in affirming the *Allison & Co. case* cited the *Standard Oil case* and its *per curiam* decision (283 U. S. 804) affirming *Brady* v. *United States*, 43 F. 2d 487; and, in affirming the *Ashland Coal Co. case*, the Court cited the *Standard Oil case* and its *per curiam* decision affirming the *Allison & Co. case*. Both the *Standard Oil case* and the *Brady case* were relied on by the 3-judge courts in both the *Allison* and *Ashland cases*. The decision in the latter case quoted at some length from the opinion in the *Brady case* which was written by Circuit Judge Parker.

In the *Brady case*, the 3-judge court was asked, in a suit by a shipper, to set aside in part a Commission order which, while awarding some reparation ($12,838.11), failed to award the amount ($57,735.11) to which the shipper believed it was entitled. The Commission, in arriving at the reduced amount, had applied a rule in mitiga-

tion of damages, and this action the shipper alleged in its bill was erroneous. Accordingly, the Commission order involved was like that in the *Allison & Co. case* in the respect that, while it was affirmative, awarding some damages, it failed to grant the full amount sought by the shipper. The court, however, while holding that it was without jurisdiction, did not rest its decision on section 9 but on broader grounds. That is to say, while it gave consideration to the fact that the Act contained provisions particularly dealing with reparation orders and suits thereon in court as distinguished from Commission orders of other kinds and the court procedure for the enforcement or enjoining thereof, the conclusion the Court reached from this and the nature and history of the provisions was that its jurisdiction "to enjoin and set aside" was never intended to attach to Commission orders relating to reparation. Among other things, the court said (pp. 850–851):

> * * * And when we take into consideration the history of the Interstate Commerce Act and its amendments and the nature of reparation orders, we are certain that it was not intended that they be included among those which the court was given the power in a suit in equity before three judges to enjoin or set aside.
>
> Reparation orders were provided for in the original Interstate Commerce Act and

were to be enforced by application to the Circuit Courts of the United States, 24 Stat. 379, 384. By the Act of March 2, 1889, provision was made that actions to enforce them should be tried at law before a jury, 25 Stat. 855, 859. Until the passage of the Hepburn Act of June 29, 1906, 34 Stat. 584, no order of the Commission was reviewable on application for injunction. The statutory jurisdiction to enjoin and set aside an order was granted by that act because then, for the first time, the rate-making power was conferred upon the Commission, and then disobedience of its orders was first made punishable. *U. S. v. Los Angeles & Salt Lake Railroad*, 273 U. S. 299, 309, 47 S. Ct. 413, 71 L. Ed. 651.

Amending section 15 of the Interstate Commerce Act, the Act of June 29, 1906, provided that the Commission should determine just, fair, and reasonable practices with respect to transportation and issue orders to carriers with respect thereto, and that all orders of the Commission, except orders for the payment of money, should take effect within such reasonable time, not less than thirty days, as might be prescribed by the Commission, unless same should be suspended or set aside by the Commission or by a court of competent jurisdiction, 34 Stat. 589, sec. 4 (49 U. S. C. A. sec. 15). By the amendment of section 16 (34 Stat. 590, sec. 5 (49 U. S. C. A. sec. 16)), it drew a clear distinction between reparation orders and

other orders of the Commission, by providing for suit in the circuit courts to collect damages in the case of reparation orders not complied with, and for application to a court of equity for the enforcement of other orders. Following this was the provision for suits to enjoin, set aside, annul, or suspend orders of the Commission; and when all of these provisions are considered together, we think it clear that the jurisdiction thus conferred was intended to relate to quasi legislative orders, in which the public at large are interested, disobedience of which is made punishable, and the suspension of which is expressly provided for by section 15 of the act, and not to reparation orders which affect only the rights of private individuals, have no binding force, and do not subject anyone to punishment for disobedience. For distinction between the two kinds of orders, see *Baer Bros.* [*Mercantile Co.*] v. *Denver & R. G. Co.*, 233 U. S. 479, 34 S. Ct. 641, 58 L. Ed. 1055.

This view is strengthened when it is remembered that the Act of June 18, 1910, creating the Commerce Court, 36 Stat. 539, vested that court with exclusive jurisdiction of suits to enjoin or set aside orders of the Commission and of only three other classes of cases, viz, suits for the enforcement of orders of the Commission, other than orders for the payment of money, suits to prevent unjust discrimination and rebating under the Act of February 19,

1903 (32 Stat. 847 (49 U. S. C. A. secs. 41–43)), and applications for writs of mandamus to require carriers to comply with the provisions of the act. It will be noted that all three of these classes embrace only cases which are prosecuted for the benefit of the public at large and to which the public, through the representation of the Attorney General or the Commission, is a party. And we think it is a reasonable inference from the fact that suits to enjoin or set aside orders of the Commission were included with these; that such suits were understood to include only those which were brought to enjoin or set aside orders made by the Commission in its quasi legislative capacity and which affected the public at large.

* * * * *

The power of this court to grant injunctions in cases of this kind is no greater than that of the Commerce Court; for we exercise jurisdiction in such cases only by virtue of the provisions of the Urgent Deficiencies Act of Oct. 22, 1913, 38 Stat. c. 32, which abolished the Commerce Court and transferred to the District Courts its jurisdiction.

The portion of the *Brady* decision above set out is the same as quoted in the *Ashland Coal Co.* decision except that two paragraphs are added at the beginning to fill out the Court's discussion of the Act's provisions as to reparation orders

and their enforcement prior to the Hepburn Act of 1906.

Near the close of the decision (p. 852), the court, in discussing the provisions of section 16 (2) authorizing suits in court to enforce awards of reparation not complied with by the carriers, said: "There is nothing in the Act, we think, which limits his (the shipper's) recovery to the amount awarded by the Commission," and there is no reason why the recovery should be so limited." Relying on this statement, apparently, Brady brought suit in a district court in an attempt to recover reparation in the amount he had sought from the Commission, that is, in an amount greater than the award allowed by the Commission. This attempt was unsuccessful, *Baltimore & Ohio R. Co.* v. *Brady*, 288 U. S. 448, the Supreme Court holding (pp. 458–459):

> * * * Section 16 (2) does not permit suit in the absence of an award, and if the Commission denies him relief, a claimant is remediless. *Standard Oil Co.* v. *United States*, 283 U. S. 235. *Brady* v. *United States*, 283 U. S. 804. *Bartlesville Zinc Co.* v. *Mellon*, 56 F. (2d) 154. No suit is permitted if the carrier pays the award. *Louisville & N. R. Co.* v. *Ohio Valley Tie Co.*, 242 U. S. 288. Cf. *Penna. R. Co.* v. *Clark Coal Co.*, 238 U. S. 456. Plaintiff may not adopt the award as the basis of his suit and then attack it. Cf. *Mitchell*

Coal Co. v. *Penna. R. Co.*, 230 U. S. 247, 258.

The fact that the Act merely makes the findings and report of the Commission *prima facie* evidence and so preserves the defendant's right to contest the award gives no support to plaintiff's contention that it does not bind him. It is to be remembered that, by electing to call on the Commission for the determination of his damages, plaintiff waived his right to maintain an action at law upon his claim. But the carriers made no such election. Undoubtedly it was to the end that they be not denied the right of trial by jury that Congress saved their right to be heard in court upon the merits of claims asserted against them. The right of election given to a claimant reasonably may have been deemed an adequate ground for making the Commission's award final as to him. Confessedly, it is final save when carriers refuse to pay within the time allowed. If by such a suit plaintiff may obtain a trial *de novo* or a revision of the award, the provisions of section 9 requiring election and prohibiting pursuit of both remedies would be set at naught in cases in which carriers refuse to pay and would be given effect in all other cases. There is no support for such a distinction. The construction for which plaintiff contends cannot be sustained. He is bound by the award.

The views of the 3-judge court in the first *Brady case* respecting a shipper's right to sue

for reparation in an amount greater than the award of the Commission were thus shown to be unsound. But it is apparent that this did not affect the soundness of its decision—its decision that its jurisdiction, as a specially constituted court, to review orders of the Commission on applications for injunctions did not extend to reparation awards or orders. This Court had but recently affirmed the decision, 283 U. S. 804, and, therefore, it is manifest that the district court's said views, later corrected, did not affect the soundness of the decision, this particularly since it was cited and relied on to support the Court's above holdings in 288 U. S. 448, and, as above shown, was relied on as authority in affirming the *Allison case* and also, it is evident, in affirming the *Ashland Coal Co. case*, in 1945. In fact, the *Brady* decision has been treated by all courts as sound and authority for what it holds.

Appellant further contends, apparently (Br. 37, 48, 51), that, whatever the force that might formerly have been given the above decisions, the decisions have in effect been repudiated by the *Rochester Telephone Co. case, supra*, and *El Dorado Oil Works* v. *United States*, 328 U. S. 12. So far as concerns the *Rochester Telephone case*, this contention seems answered by the fact, above referred to, that this Court, in overturning in that case the doctrine of nonreviewability of negative orders makes special mention of the *Standard Oil Co. case*, saying that; though there it had

held not reviewable a Commission order refusing reparation "the main basis of the decision was not the 'negative order' doctrine but the statutory scheme dealing with reparations" (307 U. S., p. 140, note 23). And there is nothing in the Court's decision in the *El Dorado Oil Works case, supra,* indicating that the Court considers that the statutory scheme dealing with reparations is no longer governing.

The Commission's determinations, held to be reviewable in the *El Dorado Oil case,* related, not to claims for reparation against the railroads, but to administrative questions which arose in an action in assumpsit brought by the Oil Works against the General American Tank Car Corporation to recover money claimed to be due under a car-leasing contract with that corporation.

Under that contract, the Oil Works leased, at specified rentals, tank cars from the Car Company and furnished them to the railroads for use in transporting its product. The Car Company collected the railroads' published tank car allowance and, as required by the contract, each month paid over the sums collected after deducting the rentals. Under the existing contract (also a prior contract) the allowances consistently exceeded the rentals in considerable amounts. So that the Oil Works was paying nothing for the cars but, instead, was making a substantial profit, which could, depending on whether the allowance was in excess of reasonable compensation

for the cars, operate as a rebate to Oil Works violative of the Elkins Act and section 6 (7) of the Interstate Commerce Act. Under the Elkins Act the Car Company (though a noncarrier) might be responsible as well as the railroads for the giving of the rebate. Because of a decision bearing on the question rendered by the Commission while the contract was in operation, the Car Company, while continuing to credit Oil Works with the rentals, discontinued payment to it of the balance collected from the railroads. The Oil Works brought against the Car Company its action in assumpsit to recover on the contract. The Car Company defended on the ground that to pay to Oil Works more than the rentals would make it a participant in the giving of a rebate violative of the Elkins Act. When the case reached this Court it was held that there were administrative questions as to practices and allowances involved requiring the Commission's determination; that it appeared that Oil Works was reaping a substantial profit from its use of the cars, that it was the policy of the Act that allowances and practices "which shall not offend against the prohibitions of the Elkins Act" shall be settled and fixed after full investigation by the Commission; and that, accordingly, the District Court should have stayed its hand pending the Commission's determinations in respect thereof.

In its petition to the Commission, Oil Works asked the Commission to hold hearings and for

an order holding that Car Company could pay the mileage earnings to Oil Works without violating the Elkins Act and that such payment would not constitute a rebate or concession. The Commission held a full investigation, joining the railroads concerned, and found that a just and reasonable allowance to Oil Works would be the cost incurred by it in furnishing the cars, namely, the monthly rental to the Car Company, that any amount in excess of that would be unjust and unreasonable in violation of section 15 (13) and would constitute a rebate and discrimination and involve a departure from the tariff rules applicable, prohibited by section 1 of the Elkins Act, and section 6 (7) of the Interstate Commerce Act. It further ordered that the proceeding before it be discontinued. (328 U. S., at 17–18.)

Oil Works brought suit in a three-judge district court to set aside the Commission's order, which court dismissed for lack of jurisdiction (59 F. Supp. 738) saying in part that

> By its finding and determination with respect to the practice here involved, the Interstate Commerce Commission made no decision which required any party to the proceeding before it to do or not to do any specific act. It followed the directions of the Supreme Court (*General American Tank Car Corp.* v. *El Dorado Terminal Co., supra* (308 U. S. 422), and determined, under the Interstate Commerce Act,

the lawfulness and reasonableness of the practice which had obtained between plaintiff and the tank car company. When this was done, its job was done. It was not required to make any order and made none and, having completed its work, stamped "finis" thereon and discontinued the proceeding. Hence there is no order, in the sense contemplated in the statute, requiring review by this court (*U. S.* v. *Griffin*, 303 U. S. 226, 233; *U. S.* v. *Ill. Cent. R. R. Co.*, 244 U. S. 82; *D. & H. Co.* v. *U. S.*, 266 U. S. 438; *U. S.* v. *L. A. Ry. Co.*, 273 U. S. 299).

In reversing the district court this Court said in part (328 U. S., at 18–19):

> * * * As the facts already stated reveal, the Commission's findings and determination if upheld constitute far more than an "abstract declaration." *Rochester Telephone Corp.* v. *United States*, 307 U. S. 125, 143. "Legal consequences" (*id.* at 132) would follow which would finally fix a "right or obligation" (*id.* at 131) on appellants' part. These findings are more than a mere "stage in an incomplete process of administrative adjudication," for the Commission here has discontinued further proceedings. *Id.* at 143. We, therefore, think that the Commission's action falls within the class of "orders" which *Rochester Telephone Corp.* v. *United States, supra*, held to be reviewable by a district court of three judges. * * *.

There is nothing in this Court's decision or that of the lower court to indicate that it was considered that a claim by Oil Works for reparation against the railroads was involved. The action in assumpsit brought by Oil Works against the Car Company was not an action by Oil Works for reparation or damages against the railroads. The administrative issue involved in the action in assumpsit was whether the allowances collected, or what amount thereof, could be paid to Oil Works without violating the Elkins Act. That issue remained the same in the circuit court of appeals and in this Court, this Court saying that it was the policy of the Act that allowances and practices which offend against the Elkins Act shall be settled and fixed by the Commission after full investigation. In compliance with this latter, the Commission conducted a full investigation joining the railroads.

In supporting the district court's decision that it was without jurisdiction, the principal contentions urged in the joint brief of the Government and the Commission and in oral argument were that the Commission's action in determining the administrative questions consisted simply of findings and conclusions; that the order discontinuing the proceeding was merely a procedural step indicating the closing of the docket; and that such action was merely an ancillary step in the action in assumpsit. This Court in its opinion made no mention of the election of

remedy provision of section 9; it made no mention of the *Standard Oil Co. case, supra*, of the *Allison & Co.* and *Ashland Coal Co. cases* or of the *Brady case*.

See *Great Lakes Steel Corp* v. *United States*, 81 F. Supp. 450, 453.

In the joint brief of the Government and Commission filed in 328 U. S. 12, the following footnote appears at page 21 thereof:

> Since, as held in the *El Dorado Terminal Co. case*, 308 U. S. at p. 431, it was the shipper (the Oil Works) and not the Car Company, which furnished the cars to the railroads, the shipper might (except for its agreement with the Car Company) have complained to the Commission and sought an award of damages (sec. 8 of the Interstate Commerce Act: see also *Paragon Ref. Co.* v. *Alton & S. R. R.*, 118 I. C. C. 166, 168). The time within which such a complaint may be filed is limited to two years (sec. 16 (3) (b)), and such provision of Section 16 "is not a mere statute of limitation but is jurisdictional." *Louisville Cement Co.* v. *Interstate Commerce Commission*, 246 U. S. 638, 642. Here the petition was not filed until 1940 although the cause of action accrued in 1934.

While the administrative questions in the *El Dorado case* involved past allowances and practices, clearly at no stage in the case or Commis-

sion proceeding was there involved a claim by Oil Works for reparation.

On the Merits.

I. The Railroads' Failure To Supply Wharves and Perform Handling Service at Army Base Piers 1 and 2, or in Lieu Thereof To Pay Appellant Allowances Was Not an Unreasonable Practice

As shown in the preliminary statement, appellant's complaint to the Commission alleged that the railroads' failure to supply wharves and perform handling service incident to delivery of its exports, etc., traffic at Army Base piers 1 and 2, or in lieu thereof, to pay it allowances for wharfage and handling, was an unreasonable practice, resulting in rates that were unjustly discriminatory, unreasonable and inapplicable.

At piers open to shippers generally at Norfolk, that is, at piers operated by public wharfingers, the railroads assume or absorb (and thus relieve shippers of) the charges of such operators for wharfage and handling service, these being 1 cent and 3 cents per 100 pounds respectively. But this they do under contracts employing the operators as their agents. So that, in principle the situation is the same as if the railroads themselves owned the piers and performed the handling, making no charge in addition to the rates therefor. At private piers, that is, piers operated by the owners of the freight, the railroads do not at Norfolk, or elsewhere, pay the shippers allow-

ances (out of the rates) for their piers and doing their own handling.

Prior to June 15, 1942, Army Base piers 1 and 2 were operated by Transport Terminal Corporation as a public wharfinger and as agent under contracts with the railroads. After the Army took over operation of the piers the situation as to traffic moving over the Army Base and piers underwent a complete change. Except for the very limited use permitted for commercial traffic, the traffic moving was military traffic, that is, it was appellant's own traffic; and, as testified, it was almost wholly for export. The railroads were advised that the terminal and piers were to be operated and controlled by the War Department and that all services would be performed by the War Department or its agency. And the testimony of the Army's own witness definitely showed that that was the way the terminal had to be and was, in fact, operated and all service performed, that is, under the close direction, management and control of the Army.

As a result of the Army taking over the terminals and piers and their management and control, the traffic, when delivered in yards, or on tracks, designated by the Army (R. 89-90) passed from the custody of the railroads into the possession of the Army, or Government, the owner of the traffic. In such circumstances the traffic was not export in the usual sense and, except for a special tariff provision would not have

been entitled to the export basis of rates (R. 91, 93, 103, 195, 288, 455). However, as explained in the preliminary statement (p. 11, *supra*), the railroads, at the request of the Army and Navy, had previously established in their tariffs a provision which accorded the export rates on shipments consigned to foreign countries and handled through Navy Yards, Navy Bases and Army Bases. But, as in effect said by the Commission, the granting of one concession did not necessarily require the granting of the further concession of paying to the Army the allowances demanded.[24] Differently stated, the according of the low export basis of rates on the traffic did not cure the basic infirmity that, under the conditions obtaining at the Army Base, the necessarily close coordination, management and control of all operations and services under one head—the Army—neither the handling service nor any other was common carrier work but was work of the shipper. Nor, under the conditions obtaining, could the wharves or piers be carrier facilities, but facilities for the Army or shippers' own uses. As stated by the Commission (R. 93–94):

> * * * The wharfage and handling at defendants', public commercial piers are transportation provided by them for the shippers. Providing a wharf and handling

[24] See footnote 11, p. 11, *supra*, showing that the railroads did not grant such allowances at any Naval or Army Base piers, where operated and controlled by the Government, etc.

> the freight at the complainant's piers are not transportation but merely facilities provided and work done by a shipper for himself on his own property at his own convenience and expense before or after the transportation is performed. The defendants may not be required, therefore, to provide a wharf or handle the freight on the complainant's piers, and not being required to do so they are not compelled to pay an allowance in lieu thereof. *Propriety of Operating Practices—Terminal Services,* 209 I. C. C. 11.

In support of the above the Commission relies on the so-called *Plant Spotting cases,* repeatedly sustained by the Supreme Court. *Propriety of Operating Practices—Terminal Services,* 209 I. C. C. 11; *U. S.* v. *Am. Tin Plate Co. et al.,* 301 U. S. 402; *U. S.* v. *Wabash R. Co.,* 321 U. S. 403. It also relies on prior decisions distinguishing between the performance of handling service on publicly operated piers and the performing of such service on piers owned by the shipper. *Weyerhauser Timber Co.* v. *Penna. R. Co.,* 229 I. C. C. 463, 472; *McCormick Warehouse Co.* v. *Penna. R. Co.,* 191 I. C. C. 727.

Broadly stated, the question involved in the *Terminal Allowance* or *Plant Spotting* cases was whether the placement of cars on so-called interchange tracks at or near an industrial plant accomplished the delivery ending the transportation service or whether the industry was entitled

to have the cars carried beyond and spotted at desired unloading points within the plant enclosure. Similarly as to the service here, while the carriers are not forbidden to operate and perform service on industry property and track, at least not if they observe the Act's requirements, they are under no basic obligation to do so. The rates of the railroads are published to cities and towns without specifying the points where the delivery will be made, but by custom the rate includes delivery on the carriers' team tracks and on ordinary factory spurs or sidings. On the other hand, so far as the larger plants are concerned delivery is usually made on interchange tracks at or near the plants. What the plants contended was that, since the railroads commonly spotted the cars at warehouses or other convenient points on factory spurs this entitled them to have cars spotted at desired unloading points within their plants. But generally within the larger plants the tracks are in constant use for industry purposes and, moreover, it was shown that it was seldom possible for the carriers to spot the cars at their own convenience. Generally, they had to be first placed on the interchange or other tracks and thereafter spotted at the unloading points desired and at the convenience and under the directions and control of the industry. As stated by Justice Cardozo in *N. Y. C. & H. R. R. Co.* v. *General Electric Co.*, 114 N. E. 115, 117:

> Transportation includes delivery. Under the plantiff's published tariffs it does not include the work of loading and unloading. Official Classification, 38, Interstate Commerce Commission. But whatever is essential in order to complete delivery, the carrier must do. That is what it is paid for when it collects its regular rates. If it fails to make delivery, and the consignee through its own instrumentalities completes the work, an allowance is due. * * * But no allowance is due for service rendered by the consignee after delivery has been made and transportation is at an end. * * *.

And later the Court said:

> Indusfrial spurs within the switching limits designated by the carrier are to be regarded, indeed, for many purposes, as an extension of the terminal. * * * But reasonable delivery does not involve the carrier's cooperation in the division of labor and of functions between the sections of a gigantic plant. This network of tracks is and must be under unified control. Order and method must reign. * * * The engines that move within this plant are not doing work the plant ought to do or effectively could do. They are doing the defendant's work. They are plant facilities.

The above decision followed upon a decision of the Commission in *General Electric Co.* v. *N. Y.*

C. & H. R. R. Co., 14 I. C. C. 237, in which the Commission said at page 242:

> The real question before us is whether complainant, under the amended act to regulate commerce, may lawfully make any change and demand any compensation from the defendants upon the facts shown of record. Is the service performed by it a carrier's service? Is it a part of the transportation undertaken by the carrier? Or is it a shipper's service—something apart from the transportation, and which is done by the shipper for its own benefit?
>
> To that question we have given such thought and reflection as its importance demands, and our conclusion is that the handling of the cars by complainant within the inclosure of its plant has not been shown to be a carrier's service—something done by the complainant which the carrier ought to do as a part of its contract of transportation—but that the storage tracks and switch tracks and all the arrangements and facilities for moving cars within its plant inclosure are for the complainant's own convenience and are necessary to the economical conduct of its business.

U. S. v. *Wabash R. Co., supra,* sustained the Commission's decision in *Staley Mfg. Co. Terminal Allowance,* 245 I. C. C. 383, and in that case, too, the Commission emphasized that what the industry desired was not common carrier work but work coordinated to meet the needs of

the industry, that is, its own work. At p. 405, the Commission said:

> The Staley Company's contention that the principles prescribed in the original report, sensibly applied, entitle the industry to free spotting is not supported by the record. All the services incident to the placement of in-bound loaded cars and removal of out-bound loads are coordinated to meet the requirements of industrial processes. The Wabash crews assigned to the plant are familiar with the needs of the industry, and they perform the work with a minimum of instructions. In several respects the status of these crews is much the same as that of trusted employees of the Staley Company. The degree of coordination involved is further emphasized by the manner in which the various switching operations are performed. * * *

In the instant case the Commission, after describing the manner in which the operations and handling service had to be performed at the Base piers, said "All activities on the piers had to be supervised and coordinated by a governing head" (R. 90). And subsequently, as above shown, it found that "Providing a wharf and handling the freght at complainants' piers are not transportation but merely facilities provided and work done by a shipper for himself on his own property" etc. This was a finding that the

providing a wharf and performing the handling were not common carrier but shipper facilities and work.

In *U. S. v. Wabash R. Co., supra* (opinion by Chief Justice Stone), the Court, speaking of the situation at the Staley plant said (p. 409):

> * * * the controlling question is whether the movement from the interchange tracks to points of loading and unloading is a plant service for the convenience of the industry, or a part of the carrier service comparable to the usual car delivery at a team track or siding. The Commission's finding that it is a plant service is supported by evidence and must be accepted as conclusive here.

In the *Terminal Allowance* or *Plant Spotting cases*, it was, as above stated, seldom possible for the railroads to perform the spotting at their convenience. The plants, including all facilities, had to be economically operated, and the saving effected through having the railroads do the work would have been insignificant compared with the disruption in economical operation if they were allowed to do it at their common carrier operating convenience. Consequently the railroads were usually paying allowances, or, if performing the spotting, were doing the work to fit the needs of the plant and under its direction and control. Speaking of this and its pronouncement in those cases, the Commission said in its final report (R. 105):

> We believe that our pronouncement may well be applied here. Although after June 15, 1942, the Transport Trading and Terminal Corporation had no facilities or terminals at the Army Base, it was the defendants' duty, under their line-haul rates, to place properly the complainant's cars for loading and unloading, and in the circumstances they discharged that obligation when they placed the cars in the complainant's storage yard adjacent to the piers.

Another thing that should not be overlooked is that, while shortly after taking over the operation of the Base piers, the Army asked the railroads to amend their tariffs so as to provide for allowances, it was not until many months later that it asked the railroads to perform the service; and even then the letter showed that the request for performance of the service was made because it was understood to be a prerequisite to an action before the Commission. In a situation where a shipper is performing work which he claims is carrier work, he can't ask to be paid, but must ask the carriers to perform the work. As frequently stated "a volunteer is entitled to no pay"; and, as expressed by the Commission, the Army could not require the railroads to hire it as their agent. While later the Army was doubtless willing to have the railroads undertake the work, the fact that the supply of civilian labor was inadequate and troops would have had to be used

plainly created a situation where "anything but operation by the complainant was impractical". (R. 90). The Commission's findings that anything but operation by the Army was impractical seems confirmed by the fact that, in its complaint to the Commission, the appellant's prayer for future relief (R. 150) does not ask the Commission to require the railroads to perform the handling or to supply wharves at the Army Base piers but, instead, to require them "to establish and pay in the future to complainant an allowance for wharfage and handling * * *."

"Whatever transportation services or facility the law requires the carriers to furnish they have the right to furnish." *Atchison, T. & S. F. Ry.* v. *United States,* 232 U. S. 199, 214. (R. 93.)

II. The Allegation of Unjust Discrimination

Because of the railroads' failure to furnish wharves at Base piers 1 and 2 and to perform handling, or in lieu thereof, to pay allowances for wharfage and handling, the appellant alleges that the rates it paid were unjustly discriminatory.

Answering this the Commission said (R. 92–93):

> The complainant asks that it be treated "exactly as commercial interests," and that it should "have the same rights and privileges that a private interest has." Section 2 of the act is to the effect that a carrier shall be deemed guilty of unjust discrimination if it receives from any person a

> greater or less compensation for any service rendered than it receives from any other person for doing him a like and contemporaneous service in the transportation of a like kind of traffic under substantially similar circumstances and conditions. The defendants do not pay allowances to private shippers for wharfage or for handling export freight and do not perform the services on private piers. The freight of other shippers which receives the unloading service is not "like traffic," and if handled in the same manner as the complainant's freight the export rates would not be accorded it, much less the accessorial services. If anything, the complainant is being favored, but, of course, this is not unlawful under the circumstances. * * *

By the term "allowances" in the above, the Commission, of course, refers to the compensation which railroads pay for use of shipper facilities or for service performed by shippers. See sec. 15 (13). That the railroads do not, in connection with private piers, pay allowances for wharfage or handling service and do not perform the service on such piers is well established by the testimony and the Commission's findings (see pp. 6, 11, *supra*). As for "the freight of other shippers (i. e., at the public commercial piers) which receives the unloading service," the Commission finds that it "is not 'like traffic' and if handled in the same manner as the complainants'

freight the export rates would not be accorded it, much less the accessorial service. If anything, the complainant is being favored, but, of course, this is not unlawful under the circumstances."

In the preceding chapter, it was pointed out that, as a result of the Army taking over the Army Base terminals and piers, the traffic, when delivered at tracks or yards designated by the Army, passed from the custody of the railroads into the possession of its owner, the Army, or Government. In such circumstances the traffic was not export in the usual sense and, except for the special tariff provision providing for such basis of rates at Army and Navy bases, would not have been entitled to the export rates. (See p. 41, *supra*). While in according the special rates to the Government the railroads were doing nothing unlawful, nevertheless the freight of private shippers receiving the accessorial services, if handled in the same manner, would not have been accorded the export basis of rates, "much less the accessorial services." Stated in a different way, if the freight of private shippers receiving the accessorial services were handled in the same manner as was appellant's traffic, such shippers would not only have had to pay for the accessorial services, but would also have had to pay higher rates than accorded appellant.

In the circumstances, it is difficult to see how the treatment accorded appellant could have been found unjustly discriminatory. It was already

receiving a concession by being accorded, in compliance with request of the Army, the low export basis of rates. As stated by the Commission (R. 103), "the granting of one concession does not necessarily require another to the same party." And there was ample to support the Commission's finding that the traffic was not of like kind. As shown in the preceding chapter, the Commission had found as follows:

> The wharfage and handling at the defendants' public commercial piers are transportation provided by them for the shippers. Providing a wharf and handling of freight at the complainants' piers are not transportation but merely facilities provided and work done by a shipper for himself on his own property at his own convenience and expense before or after the transportation is performed.

The Commission also found that the railroads' obligation to properly place appellant's cars for loading and unloading was discharged "when they placed the cars in complainants' storage yards adjacent to the piers" (R. 105). In addition to the fact that at those points the freight passed from the custody of the railroads into the possession of its owner, there was the consideration that beyond those tracks and yards the operating circumstances and conditions were such that any service whether of carriage, handling or any kind, could not be regarded as common carrier transportation. Of necessity, all operation work and

service were under the strict and close management, direction and control of the Army. Therefore, if the railroads were to undertake operation or the rendering of service under these conditions, their common carrier status would have been subordinated to the convenience and needs of the shipper. The work would not have been common carrier transportation but the shippers' own work.

Supporting the Commission's conclusions as to this the Commission's findings show, among other things, that the Belt Line (performing the terminal switching for the owning railroads) delivered the cars at the "storage yard" and to some extent at the "north gate"; that it did this pursuant to prior instructions from the Army and on tracks designated by the Army; that, thereupon, the Army took possession of the shipments and controlled the movement beyond to the pier connections, operating several locomotives (with crews) of its own and one locomotive (with two crews) contributed by the Belt, but all at the direction of the Army's yardmasters; that the freight had to be handled according to priorities and various changing conditions confronting the Army, some cars having to be unloaded immediately whereas others were held a short time or the freight unloaded and stored on the piers or in warehouses; that frequently the Army had to load vessels day and night to meet a convoy deadline hour based on oversea calls; that all activi-

ties on the piers had to be supervised and coordinated by a governing head; that, as labor shortages developed, the Army assigned Italian service units to this work, and sometimes stevedores to supplement civilian labor; and that, at the time of the hearing, the civilian personnel was only about one-half of the total number employed (R. 89–90, 105).

While appellant attacks in various ways the Commission's conclusion that the railroads' failure under these conditions to supply warfage or perform handling at the Army Base piers was not unjustly discriminatory, their assertions, it is believed, are not in point.

In *U. S.* v. *Wabash R. Co., supra,* the question of unjust discrimination was raised by the Staley Company. In answer, the Court said (p. 411), "In determining whether there is a prohibited unjust discrimination or undue preference, it is for the Commission to say whether such differences in conditions exist and whether, in view of them, the discriminations or preference is unlawful. See *Barringer & Co.* v. *United States,* 319 U. S. 1, 7–8, and cases cited."

III. The allegation that the railroads' failure resulted in inapplicable rates or tariff departures

In its report on reargument the Commission said (R. 103):

> One of the questions here presented is whether the defendants, when they re-

fused, subsequent to June 15, 1942, to pay the complainant an allowance for wharfage and handling at Army Base Piers 1 and 2, or, in the alternative, to perform the handling service themselves, violated section 6 of the act, which provides in effect that the carriers shall not depart from the requirements of their published tariffs. The name of the Transport Trading and Terminal Corporation, as a terminal operator at Norfolk as to wharfage handling, and terminal services being included in the line-haul rates and allowances therefor, was not immediately canceled from the tariffs when the complainant assumed the operation of these two piers on June 15, 1942. The reference in the tariffs in some instances was to the "terminals" and in other instances to the "facilities" of the Transport Trading and Terminal Corporation, but no mention was made in those tariffs to Army Base Piers 1 and 2 by that name. In order to sustain the complainant's contention, therefore, it would be necessary to read into the tariffs words which were not there.

Appellant sets out (Br. 72) as representative the tariff of the Virginian Railway which provides substantially that "at * * * Transport Trading and Terminal Corporation * * * wharfage, handling and terminal charges (as published in the Belt Line's tariff) will be included in the transportation rates applicable to or from Norfolk, Va., on the following traffic moving in con-

nection with the Virginian Railway through the above terminals." Appellant contends that both the language and long construction given the tariffs shows that the Commission interpretation was erroneous.

It would seem that the Commission's construction was the only one that could be given the tariffs; and, in this connection, it will be recalled that, when the Army took over operation of the piers, what it asked of the railroads was that they amend their tariffs so as to provide for payment to petitioner of allowances, 1 cent per 100 pounds for wharfage and 3 cents for handling. Also it should be noted that the thing the Army found lacking was the failure of the tariffs to authorize allowances to the Government on freight handled over Army Base Piers No. 1 and 2 (R. 370).

It will also be recalled that complainant, in praying the Commission for future relief, asked the Commission to establish (presumably in their tariffs) and pay to it allowances for wharfage and handling, all of which confirms the Commission's ruling. Another thing is that when Transport Terminal Corporation was operating the piers, the charges of that operator which the railroads assumed and paid were compensation paid their agent, the public pier operator. They were not allowances within section 15 (13) and certainly this works against any construction that would treat the provisions for payments to Trans-

port Terminal Corporation as allowances which the tariffs required be paid the appellant, shipper, or owner of the property transported.

IV. The Allegation That the Rates Were Unreasonably High

Appellant's contention that the rates charged the Government were unreasonably high rests, as do other of its contentions, on the railroads' refusal to pay the allowances (out of the rates) asked of them, or in lieu thereof to perform the service. As emphasized by the Commission, if the rates were already below reasonable maxima rates, it would be without authority to order action having the effect of reducing them still further.

Furthermore, due to severe competition for export traffic with Baltimore and other ports at shorter distances from important origins, the export rates to Norfolk were depressed to a point below the level of reasonable rates. The according of the allowances claimed would, in effect, have reduced the rates to a still lower level. This seems to have been recognized by Government counsel at the hearing. At the oral argument the following colloquy between Commissioner Barnard and complainant's counsel occurred (R. 559):

> Commr. Barnard. But Mr. MacGuineas, I repeat that I think that you have the burden of showing that the maximum re-

maining would be a fair rate for the carriers, to the carrier, after you had exacted the 4 cents. You didn't do that as I understand the record?

Mr. MACGUINEAS. Well, as I understand the carrier's contention, they make the position that we have not proven that to receive the line-haul rate without rendering this terminal service, would be above the reasonable maximum. That is their position. Well, we say that is immaterial. The rate is somewhere within the limits of reasonableness, and the carriers, as I say, for 25 years, have assumed that obligation, they are failing to discharge it with respect to the Army, and with respect to the Army alone, and thereby are keeping for themselves 4 cents a hundred pounds.

In its report on reargument, the Commission, after full discussion of the matter said (R. 108):

* * * No evidence was adduced by the complainant to show that the export rates to Norfolk, in and of themselves, were and are unreasonably high. The complainant's contention is that these rates are shipside rates and they are unreasonable because no allowance has been made to it for the wharfage and handling. It is well settled that there is nothing inherent in export traffic which entitles it to rates lower than those applied to domestic traffic, and as nothing has been added to the export rates here in issue to cover the wharfage and handling they are not above a

> reasonable maximum level when a reasonable charge for wharfage and handling is added. This being true, an order directing the defendants to pay the complainant reparation in the amount of the aforementioned wharfage and handling charge would make the export rates just that much below the upper limit of reasonableness. * * *

In its first report on reconsideration the Commission said (R. 82):

> The line-haul rates in question are less than reasonable maxima and nothing has been added to them to cover the cost of wharfage and handling. * * *. None of the Norfolk rates exceed the domestic rates; practically all of them are lower. They are generally the same as the rates to and from Baltimore, although movement to and from Norfolk generally entails longer hauls. For example, from 106 important points in central territory the average distances are 838 miles to Norfolk and 690 miles to Baltimore. On class-rate traffic the export and import rates from and to Norfolk are more than 9 percent less than the corresponding prescribed domestic rates.

As above stated, the Commission, acting on the ground of unreasonableness, is without authority to order action having the effect of reducing rates already well below the level of reasonable maxima.

CONCLUSION

For the reasons stated, the judgment of the District Court should be affirmed.

Respectfully submitted.

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FEBRUARY 1949.

APPENDIX

The pertinent provisions of the Judicial Code as amended by the Urgent Deficiencies Act of October 22, 1913, 38 Stat. 208 (28 U. S. C. (1946 ed.) 41 (28), 43–47, 48; section numbers are to United States Code) are as follows:

§ 41. *Original jurisdiction.*—The district courts shall have original jurisdiction as follows:

(28) *Setting aside order of Interstate Commerce Commission.* — Twenty-eighth. Of cases brought to enjoin, set aside, annul, or suspend in whole or in part any order of the Interstate Commerce Commission.

§ 45a. (*Judicial Code, sections 212, 213.*) *Special attorneys; participation by Interstate Commerce Commission; intervention.*—The Attorney General shall have charge and control of the interests of the Government in the cases specified in section 44 of this title and in the cases and proceedings under sections 20, 43, and 49 of Title 49, in the district courts, and in the Supreme Court of the United States upon appeal from the district courts. If in his opinion the public interest requires it, he may retain and employ in the name of the United States, within the appropriations from time to time made by the Congress for such purposes, such special attorneys and counselors at law as he may think necessary to assist in the discharge of any of the duties incumbent upon him and his subordinate attorneys; and the Attorney General shall stipulate with such special

attorneys and counsel the amount of their compensation, which shall not be in excess of the sums appropriated therefor by Congress for such purposes, and shall have supervision of their action: *Provided*, That the Interstate Commerce Commission and any party or parties in interest to the proceeding before the commission, in which an order or requirement is made, may appear as parties thereto of their own motion and as of right, and be represented by their counsel, in any suit wherein is involved the validity of such order or requirement or any part thereof, and the interest of such party; and the court wherein is pending such suit may make all such rules and orders as to such appearances and representations, the number of counsel, and all matters of procedure, and otherwise, as to subserve the ends of justice, and speed the determination of such suits: *Provided further*, That communities, associations, corporations, firms and individuals who are interested in the controversy or question before the Interstate Commerce Commission, or in any suit which may be brought by anyone under the provisions of the aforesaid sections relating to action of the Interstate Commerce Commission, may intervene in said suit or proceedings at any time after the institution thereof; and the Attorney General shall not dispose of or discontinue said suit or proceeding over the objection of such party or intervenor aforesaid, but said intervenor or intervenors may prosecute, defend, or continue said suit or proceeding unaffected by the action or nonaction of the Attorney General therein.

Complainants before the Interstate Commerce Commission interested in a case shall have the right to appear and be made parties to the case and be represented before the courts by counsel, under such regulations as are now permitted in similar circumstances under the rules and practices of equity courts of the United States. (Mar. 3, 1911, ch. 231, §§ 212, 213, 36 Stat. 1150, 1151; Oct. 22, 1913, ch. 32, 38 Stat. 220.)

§ 46. (*Judicial Code, section 208.*) *Suits to enjoin orders of the Interstate Commerce Commission to be against United States.*—Suits to enjoin, set aside, annul, or suspend any order of the Interstate Commerce Commission shall be brought in the district court against the United States. The pendency of such suit shall not of itself stay or suspend the operation of the order of the Interstate Commerce Commission; but the court, in its discretion, may restrain or suspend, in whole or in part, the operation of the commission's order pending the final hearing and determination of the suit. (Mar. 3, 1911, ch. 231, § 208, 36 Stat. 1149; Oct. 22, 1913, ch. 32, 38 Stat. 219.)

§ 47. *Injunctions as to orders of Interstate Commerce Commission; appeal to Supreme Court; time for taking.*—No interlocutory injunction suspending or restraining the enforcement, operation or execution of, or setting aside, in whole or in part, any order made or entered by the Interstate Commerce Commission shall be issued or granted by any district court of the United States, or by any judge thereof, or by any circuit judge acting as district judge, unless the application for the same

shall be presented to a circuit or district judge, and shall be heard and determined by three judges, of whom at least one shall be a circuit judge and unless a majority of said three judges shall concur in granting such application. When such application as aforesaid is presented to a judge, he shall immediately call to his assistance to hear and determine the application two other judges. Said application shall not be heard or determined before at least five days' notice of the hearing has been given to the Interstate Commerce Commission, to the Attorney General of the United States, and to such other persons as may be defendants in the suit: *Provided,* That in cases where irreparable damage would otherwise ensue to the petitioner, a majority of said three judges concurring, may, on hearing, after not less than three days' notice to the Interstate Commerce Commission and the Attorney General, allow a temporary stay or suspension, in whole or in part, of the operation of the order of the Interstate Commerce Commission for not more than sixty days from the date of the order of said judges pending the application for the order or injunction, in which case the said order shall contain a specific finding, based upon evidence submitted to the judges making the order and identified by reference thereto, that such irreparable damage would result to the petitioner and specifying the nature of the damage. The said judges may, at the time of hearing such application, upon a like finding, continue the temporary stay or suspension in whole or in part until decision upon the application. The hearing upon such application for an interlocutory injunction shall

be given precedence and shall be in every way expedited and be assigned for hearing at the earliest practicable day after the expiration of the notice hereinbefore provided for. An appeal may be taken direct to the Supreme Court of the United States from the order granting or denying, after notice and hearing, an interlocutory injunction, in such case if such appeal be taken within thirty days after the order, in respect to which the complaint is made, is granted or refused; and upon the final hearing of any suit brought to suspend or set aside, in whole or in part, any order of said commission the same requirement as to judges and the same procedure as to expedition and appeal shall apply. (Oct. 22, 1913, ch. 32, 38 Stat. 220.)

§ 48. (*Judicial Code, section 211.*) *Suits to be against United States; intervention by United States.*—All cases and proceedings specified in section 44 of this title shall be brought by or against the United States, and the United States may intervene in any case or proceeding whenever, though it has not been made a party, public interests are involved. (Mar. 3, 1911, ch. 231, § 211, 36 Stat. 1150; Oct. 22, 1913, ch. 32, 38 Stat. 219.)

The pertinent provisions of the Interstate Commerce Act, as amended, are as follows:

Section 1, Paragraph (5) (a) of Part I of the Interstate Commerce Act:

(5) (a) All charges made for any service rendered or to be rendered in the transportation of passengers or property, or in connection therewith, shall be just and reasonable, and every unjust and unreasonable charge for such service or any part thereof

is prohibited and declared to be unlawful. (49 U. S. C. 1 (5) (a).)

Section 1, Paragraph 6 of Part I of the Interstate Commerce Act:

> (6) It is hereby made the duty of all common carriers subject to the provisions of this part to establish, observe, and enforce just and reasonable classifications of property for transportation, with reference to which rates, tariffs, regulations, or practices are or may be made or prescribed, and just and reasonable regulations and practices affecting classifications, rates, or tariffs, the issuance, form, and substance of tickets, receipts, and bills of lading, the manner and method of presenting, marking, packing, and delivering property for transportation, the facilities for transportation, the carrying of personal, sample, and excess baggage, and all other matters relating to or connected with the receiving, handling, transporting, storing, and delivery of property subject to the provisions of this part which may be necessary or proper to secure the safe and prompt receipt, handling, transportation, and delivery of property subject to the provisions of this part upon just and reasonable terms, and every unjust and unreasonable classification, regulation, and practice is prohibited and declared to be unlawful. (49 U. S. C. 1 (6).)

Section 2 of Part I of the Interstate Commerce Act:

> That if any common carrier subject to the provisions of this part shall, directly or indirectly, by any special rate, rebate, drawback, or other device, charge, demand, collect, or receive from any person or per-

sons a greater or less compensation for any service rendered, or to be rendered, in the transportation of passengers or property, subject to the provisions of this part, than it charges, demands, collects, or receives from any other person or persons for doing for him or them a like and contemporaneous service in the transportation of a like kind of traffic under substantially similar circumstances and conditions, such common carrier shall be deemed guilty of unjust discrimination, which is hereby prohibited and declared to be unlawful. (49 U. S. C. 2.)

Section 8 of Part I of the Interstate Commerce Act:

That in case any common carrier subject to the provisions of this part shall do, cause to be done, or permit to be done any act, matter, or thing in this part prohibited or declared to be unlawful, or shall omit to do any act, matter, or thing in this part required to be done, such common carrier shall be liable to the person or persons injured thereby for the full amount of damages sustained in consequence of any such violation of the provisions of this part, together with a reasonable counsel or attorney's fees, to be fixed by the court in every case of recovery, which attorney's fee shall be taxed and collected as part of the costs in the case. (49 U. S. C. 8.)

Section 9 of Part I of the Interstate Commerce Act:

That any person or persons claiming to be damaged by any common carrier subject to the provisions of this part may either make complaint to the Commission as hereinafter provded for, or may bring suit in

his or their own behalf for the recovery of the damages for which such common carrier may be liable under the provisions of this part, in any district or circuit court of the United States of competent jurisdiction; but such person or persons shall not have the right to pursue both of said remedies, and must in each case elect which one of the two methods of procedure herein provided for he or they will adopt. In any such action brought for the recovery of damages the court before which the same shall be pending may compel any director, officer, receiver, trustee, or agent of the corporation or company defendant in such suit to attend, appear, and testify in such case, and may compel the production of the books and papers of such corporation or company party to any such suit; the claim that any such testimony or evidence may tend to criminate the person giving such evidence shall not excuse such witness from testifying, but such evidence or testimony shall not be used against such person on the trial of any criminal proceeding. (49 U. S. C. 9.)

Section 15, Paragraph (13) of Part I of the Interstate Commerce Act:

(13) If the owner of property transported under this part directly or indirectly renders any service connected with such transportation, or furnishes any instrumentality used therein, the charge and allowance therefor shall be published in tariffs or schedules filed in the manner provided in this part and shall be no more than is just and reasonable, and the Commission may, after hearing on a complaint or on its own initiative, determine what is a

reasonable charge as the maximum to be paid by the carrier or carriers for the services so rendered or for the use of the instrumentality so furnished, and fix the same by appropriate order, which order shall have the same force and effect and be enforced in like manner as the orders above provided for under this section. (49 U. S. C. 15 (13).)

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